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THE NATURAL LAW COMPONENT OF THE NINTH AMENDMENT

Calvin R. Massey*

Natural law both frightens and fascinates us. We fear it because we suspect that "you can invoke natural law to support anything you want."¹ We are fascinated with it because it holds the promise of providing a normative reference point which reconciles the ageless conundrum of free choice (to which moral responsibility can be attached) in a causally determined universe (from which individual moral responsibility appears to be absent). If there is some plausible way of ascribing normative significance to the determinate events of our existence, then we have located a standard by which the nominal free choice of an actor within that constrained and determined world can be judged. Even more importantly, this standard is one which may operate to legitimate evaluation and rejection of governmental rules which contravene the normative natural order. We fear that this quest is illusory, that there is no such discoverable standard, and that all attempts to locate one must degenerate into either unprincipled assertions of personal preference² or statements at such a high order of abstraction that they are "uselessly vague."³

The duality of this preoccupation with natural law has been a part of American constitutional law since its inception. From the celebrated debate between Justices Samuel Chase and James Iredell in *Calder v. Bull*⁴ to Justice Clarence Thomas, constitutional scholars and judges have flirted with natural law as a device to amplify, supplement, or simply fill the interstices of the written law of the Constitution.⁵ The legitimacy of natural law as an aspect of

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1. JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 50 (1980).

2. See BENJAMIN F. WRIGHT JR., *AMERICAN INTERPRETATIONS OF NATURAL LAW* 339 (1931) (stating that "natural law has had as its content whatever the individual in question desired to advocate"); see also CLINTON ROSSITER, *SEEDTIME OF THE REPUBLIC* 366, 375 (1953) (noting that in Revolutionary times, natural law assumed different shapes in service of "different peoples and purposes").

3. ELY, *supra* note 1, at 51. Ely's example is the statement "no one should needlessly inflict suffering." *Id.*

4. 3 U.S. (3 Dall.) 386 (1798).

5. Among the academic contributions to this literature are Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928) (Part One); Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365 (1928) (Part Two); Thomas Grey, *Origins of the Unwritten Constitution:*

constitutional law has been assailed on two major fronts. Some have contended that there is no textual or historical warrant for reading such a principle into the Constitution.⁶ If by some feat of intellectual legerdemain it is possible to do so, it is still claimed to be impossible to locate principles of natural law which can serve as rules of decision in any particular case without resorting to one's personal preferences about the issues in question.

This article is an attempt to confront and rebut these objections to any place for natural law in the constitutional constellation. I have argued in the past that the Ninth Amendment⁷ is natural law's logical textual home within the Constitution,⁸ that the constitutional framers intended it, in part, to perform this role,⁹ and that a principled methodology for location of these unenumerated rights can be devised.¹⁰

In Part I of this article, I contend that the political and social theories which composed the intellectual heritage of the revolutionary generation support the conclusion that the advent of the Constitution, including the Bill of Rights, did not operate to preclude natural law from a role in constitutional adjudication. Part II summarizes the historical arguments concerning the founding generation's intentions for the Ninth Amendment, concluding that the best account of the evidence is that the founding generation intended the Ninth Amendment to serve multiple purposes, including

Fundamental Law in American Revolutionary Thought, 30 STAN. L. REV. 492 (1978); Thomas Grey, *Do We Have an Unwritten Constitution?* 27 STAN. L. REV. 703 (1975); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987). Notable examples of the Supreme Court's employment of natural law methodology within the rubric of constitutional adjudication include *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (in which Court refused "to ascribe the source of [the right to travel to any] . . . particular constitutional provision"); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (locating the right to privacy in "emanations formed by the penumbras" of certain of the enumerated rights in the Constitution); Justice Miller's opinion in *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655 (1874); *Scott v. Sanford*, 60 U.S. (19 How.) 393, 407 (1857) (inferring from framers' intent and structure of original constitutional design conclusion that "the black man has no rights which the white man is bound to respect"); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139 (1810) (finding the Georgia statute at issue to violate "general principles which are common to our free institutions"); and the opinion of Justice Chase in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

6. See Raoul Berger, *Natural Law and Judicial Review: Reflections of an Earthbound Lawyer*, 61 U. CIN. L. REV. 5 (1992); Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?* 69 N.C. L. REV. 421 (1991).

7. U.S. CONST. amend. IX: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

8. Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305 (1987) [hereinafter Massey, *Fundamental Rights*].

9. *Id.* at 343.

10. *Id.* at 330-31, 337-43.

a role as a judicially enforceable source of natural law rights. In Part III, I will concede, for purposes of argument, that the framers may have intended the Ninth Amendment to function as a device to prevent a latitudinarian construction of the enumerated powers delegated to Congress. This argument asserts that the Ninth Amendment's sole function was to guard against the danger that political actors might infer from the enumeration of individual rights as categorical limitations upon the exercise of federal legislative power a corresponding increase in the implied powers of Congress to act otherwise than in infringement upon the enumerated rights.¹¹ For the purpose of argument, Part III grants this contention but contends that the structural role thereby envisioned for the Ninth Amendment can only be obtained today by treating the amendment as a source of individual rights judicially enforceable against, at the very least, the federal government. Part IV attempts to provide an exposition of the method by which courts might locate unenumerated rights grounded in natural law.

A significant caveat applies to the entire argument contained in this article. I have argued elsewhere that judicially enforceable Ninth Amendment rights should be recognized as consisting of two

11. See Thomas McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990). McAfee appears to make this argument when he declared his intention to defend the traditional view of the Ninth Amendment "as part of a scheme for preserving . . . the concept of a national government of limited and enumerated powers. The unenumerated rights, by this reading, are the rights of the people reserved by the device of listing granted powers." *Id.* at 1218. "[T]he purpose of the ninth amendment is to ensure these reserved rights . . . against any adverse inference that might be drawn from the addition of a bill of rights." *Id.* at 1219-20. McAfee called this approach the "'residual rights' reading—underscoring that on this reading the other rights retained by the people are defined residually from the powers granted to the national government. . . . The residual rights reading sees the ninth amendment as designed to preserve the scheme of limited powers for securing interests that include, but are not necessarily limited to, traditional sorts of individual rights." *Id.* at 1221-22. McAfee contrasted his residual rights reading of the Ninth Amendment with the "affirmative rights" reading: the view "that the ninth amendment refers to constitutional rights as we generally think of them today—legally-enforceable, affirmatively defined limitations on governmental power on behalf of individual claimants." *Id.* at 1222. The straightforward conclusion to be drawn from McAfee's residual rights reading is that the Ninth Amendment should operate to preserve retained rights by constraining the implied powers of the federal government.

However, at several points McAfee departed from this reading and made the broader, and quite unwarranted, claim that the Ninth Amendment was designed only to negate the *specific* inference that, because a right was enumerated (e.g., free speech) there was a corresponding implied general power in Congress to regulate speech. *Id.* Though not entirely free from doubt, I regard McAfee to be making the more sensible, and less narrow, argument that the Ninth Amendment was designed to frustrate any attempts to imply congressional power beyond the limits of the enumerated powers of Congress.

distinct kinds with different sources of origin.¹² One type of proposed Ninth Amendment right is rooted in the positive law of state constitutions. These rights would represent the aspect of the Ninth Amendment that is preservative of federalism by vesting in the polities of each state the power to preserve aspects of human liberty from invasion by either their state or federal governmental agents.¹³ The other type of proposed Ninth Amendment right is grounded in natural law. These rights ought to be recognized as legitimate and judicially enforceable constitutional norms for three sound reasons: 1) the text of the Ninth Amendment suggests that we do so, 2) the framers of the Ninth Amendment may very well have intended precisely that result, and 3) even if the framers intended by the Ninth Amendment only to hem in federal legislative power, that objective can only be realized effectively today by reading the Ninth Amendment as a source of individual rights to frustrate the boundless exercise of federal legislative power. In this article I will not deal with the dimension of the Ninth Amendment that is connected to state constitutions as the source of constitutional liberties; I will examine only the natural law aspect of the Ninth Amendment.

THE POLITICAL THEORY OF THE REVOLUTIONARY GENERATION

No sensible attribution to the framers of an intended purpose for the Ninth Amendment can be made without some understanding of the intellectual background upon which they acted. This background was anything but monochromatic; the framers were widely read, reflective and thoughtful consumers of diverse and often incompatible views on matters of political, economic, and social theory.¹⁴ When Americans of the late eighteenth century sought to synthesize "the several traditions [they] had inherited from Britain and Europe, [the resulting] body of literature by Americans about America lacked explicit philosophical coherence. Nevertheless, it reflected the profound sense of openness and broad socio-economic opportunity, the ambivalence about authority and about traditional conceptions of the social order . . . that were perhaps the most important elements determining how Americans received and used the

12. Massey, *Fundamental Rights*, *supra* note 8, at 343.

13. For a fuller exposition of this argument, see Calvin R. Massey, *The Anti-Federalist Ninth Amendment and its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229.

14. See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); JACK P. GREENE, *THE INTELLECTUAL HERITAGE OF THE CONSTITUTIONAL ERA* (1986); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969).

many elements of their rich . . . intellectual inheritance.”¹⁵ It is thus not surprising that Forrest McDonald concluded that “it is meaningless to say that the Framers intended this or intended that: their positions were diverse and, in many particulars, incompatible.”¹⁶

This rather formidable caution ought to temper the zeal of those who seek to reduce constitutional law to a matter of ascertaining some supposed unitary original intention of the framers.¹⁷ However, even granting the insuperable difficulties of locating with any degree of usable certainty the intentions of the framers, it may be that we can discuss intelligently and derive some value from the nature of the richly spiced intellectual stew that fed the creation of our Constitution.

From a political standpoint, the framers were Englishmen. “From the beginning of English settlement in North America, colonists believed themselves the equals of native Englishmen and entitled to the ‘rights of Englishmen’. . . .”¹⁸ It is not as important whether these rights were created by statute, common law, customary tradition, or inalienable “natural” and fundamental principles as it is to understand the Revolutionary generation’s eclectic and rather muddled conception of the nature of the “rights of Englishmen.”

Colonial Americans would most likely have associated their inherited rights with the English tradition of constitutionalism. This tradition recognized the unwritten English constitution, which “consisted of a mixture of custom, natural law, religious law, enacted law, and reason,” to be fundamental “higher law . . . [which] existed and operated to make void Acts of Parliament inconsistent with that fundamental law.”¹⁹ The mechanism of invalidation was, however,

15. GREENE, *supra* note 14, at 56.

16. McDONALD, *supra* note 14, at 224; see also James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?* 58 U. CHI. L. REV. 1321, 1323 (1991). Whitman stated,

For generations, [we] have debated whether the legal thinking of the American Revolutionaries was “about” custom or “about” deductive natural law. . . . Both . . . interpretation[s] attribute much more coherence and intelligibility to revolutionary era legal writings than those writings possess. Revolutionary era lawyers unreflectively conflated reason and custom—which means that, in many respects, we can never draw definitive conclusions about constitutional interpretation from their writings.

Id.

17. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990) (criticizing departure from “original” understanding). For the view that the original intent of the framers was that their intent would not bind future generations, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

18. Massey, *Fundamental Rights*, *supra* note 8, at 319-20.

19. Sherry, *supra* note 5, at 1129.

more problematic. Suzanna Sherry contended that judges were thought to be entitled to "use that fundamental law to pronounce void inconsistent legislative or royal enactments."²⁰ Helen Michael argued that, while such a power of judicial review might be found in the theories of Coke, Bolingbroke, and the "Country" opposition party of late seventeenth and early eighteenth century Britain, it was not widely assumed by Americans, who preferred instead to vindicate fundamental law in more populist fashion—through legislation and, if necessary, revolution.²¹ As with so much that pertains to our revolutionary past, both views are accurate, a result that makes it virtually impossible to dictate results for today from the verdicts of history.

Coke

There can be no doubt that colonial Americans were heavily influenced by Coke and the associated theories of the Country party opposition. As Edward Corwin noted, Coke "was first on the ground" in the colonies, which resulted in a pervasive "presence of Coke's doctrines . . . during the latter two-thirds of the seventeenth century."²² Indeed, "the seventeenth century was Coke's"²³ and while "the early half of the eighteenth century was Locke's"²⁴ American "independence brought with it the triumph, at least temporarily, of the anti-capitalistic, 'country-party' ideology . . . of the English Opposition."²⁵

An integral part of the Cokean ideology was the idea, set forth most explicitly in *Bonham's Case*,²⁶ that courts possessed the power to invalidate legislation offensive to constitutional fundamental law. Dr. Thomas Bonham practiced medicine without a certificate from the Royal College of Physicians, although he held a medical degree from Cambridge. The College Censors first fined him five pounds, then imprisoned him when he continued to practice medicine. Bonham sued the College Censors and President for false imprisonment. The College asserted in its defense its statute of incorporation, which authorized it to regulate all physicians and punish with fine and imprisonment practitioners not licensed by it. The statute also gave the College one half of all fines imposed by it.

20. *Id.*

21. See generally, Michael, *supra* note 6.

22. Corwin, *supra* note 5, at 394.

23. *Id.* at 395.

24. *Id.*

25. McDONALD, *supra* note 14, at 59.

26. 77 Eng. Rep. 646 (K.B. 1610).

In deciding against the College, Coke was of the opinion that "[t]he censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture, because no person may be a Judge in his own cause . . .; and one cannot be Judge and attorney for any of the parties. . . ." ²⁷ But the enabling statute plainly granted this power to the College. No matter, said Coke, for "it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void. . . ." ²⁸

Scholars have argued whether Coke's decision was rooted in a constitutional mandate, vesting courts with the power of judicial review of legislative acts, or merely one of strict statutory construction, rendering the quoted passage merely *obiter dictum*. ²⁹ Regardless of the weight of the declaration, it seems unmistakable that when Coke invoked "common right and reason" he was referring to "something fundamental, something permanent; . . . higher law . . . binding on Parliament and the ordinary courts alike." ³⁰

Whatever its merits, the academic debate came later. Colonial Americans could read Coke for themselves, and did. Coke was popular in no small part because of his role in defending the rights of parliament and the people against Stuart absolutism. His views were clearly set forth in his *Institutes*, particularly in the *Second Institute*, which restated the rights of Englishmen under Magna Charta and succeeding statutes. In the prologue to the *Second Institute*, Coke cited parliamentary enactments that invalidated any law or action contrary to Magna Charta. As Professor Howard has observed, "Coke was speaking of statutes which had thus enshrined Magna Charta, but his commentaries helped lay the way for the view, subscribed to in the American colonies, of the Charter as a kind of

27. *Id.* at 652.

28. *Id.*

29. Professor Plucknett contended that the case states a theory of fundamental law. See THEODORE F.T. PLUCKNETT, *CONCISE HISTORY OF THE COMMON LAW* 337 (1956); Theodore F.T. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 68-70 (1926). Professor Thorne asserted that the case supports only a theory of strict statutory construction. See S.E. Thorne, *Dr. Bonham's Case*, 54 LAW Q. REV. 543, 548-52 (1938).

30. Corwin, *supra* note 5, at 370, 372.

superstatute, a constitution placing fundamental liberties beyond the reach of Parliament as well as the King and his ministers."³¹

But Americans did not understand Coke to confine judicial review to cases of parliamentary invasion of Magna Charta or other written declarations of the rights of Englishmen. When James Otis, Jr. thundered against the validity of general writs of assistance in *Paxton's Case*³² (the *Writs of Assistance Case*) he had no doubt that *Bonham's Case* was good authority for the proposition that courts could invalidate legislation on the grounds that it offended "fundamental Principles of Law."³³ John Adams, who witnessed Otis's performance, later declared that "[t]hen and there the child independence was born,"³⁴ for the clear implication of Otis's assertion was that any colonial court possessed authority to invalidate the legislation of the imperial Parliament. To Corwin, this principle was nothing short of the birth of American constitutional law.³⁵

It was not a principle that went unused in the turbulent final years of colonial existence. A Virginia court declared the Stamp Act to be unconstitutional,³⁶ while arguments in Massachusetts against the Stamp Act were that "the Act . . . is against Magna Charta, and the natural Rights of Englishmen, and therefore, according to Lord Coke, null and void."³⁷ Even the loyalist judges in Massachusetts

31. A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE* 122 (1968). Coke could be maddeningly inconsistent. In the Fourth Part of his *Institutes* he opined that "the power and jurisdiction of . . . Parliament . . . is so transcendent and absolute . . . it cannot be confined either for causes or persons within any bounds." EDWARD COKE, *FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 36 (1681). But this statement is followed by examples of its "boundless" exercise, most of which amount to Parliament's ability to alter the common or statutory law of the realm. Coke cited one case—the attainder of Thomas Cromwell, Earl of Essex, during the reign of Henry VIII—in which Henry's judges, much pressed by the King, expressed the view that Parliament could attain without giving the subject any opportunity to respond to the charge. Of this, Coke said that "their opinion was according to law, yet might they have made a better answer, for [by] . . . Mag[na] Char[ta] . . . no man ought to be condemned without answer." *Id.* at 38. The reader is left wondering whether Coke thought Parliament exceeded its authority or the judges simply erred. Even if Coke's view of parliamentary power in his *Institutes* is irreconcilable with his view in *Bonham's Case*, the most telling fact is that colonial Americans relied on *Bonham's Case*, not the *Institutes*, to proclaim the legitimacy of a judicial check upon parliamentary power.

32. QUINCY'S MASSACHUSETTS REPORTS 51 (1761) and appendices 395-552, of which 469-85 are especially germane. See also MAURICE H. SMITH, *THE WRITS OF ASSISTANCE CASE* (1978).

33. QUINCY'S MASSACHUSETTS REPORTS at 471. Otis expressly invoked the authority of *Bonham's Case*. *Id.* at 474.

34. 10 ADAMS, *LIFE AND WORKS* 248 (C.F. Adams ed., 1850), quoted in Corwin, *supra* note 5, at 398.

35. Corwin, *supra* note 5, at 398.

36. *Id.* at 399.

37. QUINCY'S MASSACHUSETTS REPORTS 527 n.28.

agreed that "an Act of Parliament against natural Equity is void."³⁸ Nor was this principle confined to imperial legislation. George Mason relied upon Coke to argue successfully to a Virginia court that a 1682 act of the Virginia Assembly should be declared void.³⁹ This is not to suggest that Otis's argument in the *Writs of Assistance Case* sparked an unbroken trend toward vigorous exercise of judicial review in the service of unwritten fundamental law;⁴⁰ rather, it is only to claim that the Cokean legacy was a powerful and influential aspect of the intellectual heritage of the framers.

Locke and the Continental Enlightenment

If Coke provided the jurisprudential foundation for American lawyers, John Locke supplied much of the political theory that actuated the revolutionary generation.⁴¹ "The Patriots turned to Locke rather than to the other great natural law theorists—Hugo Grotius, Samuel von Pufendorf, Thomas Rutherforth, Burlamaqui, Vattel—for the reason that none of the others was so well adapted to their purposes."⁴² Only Locke provided a convincing rationale for independence by declaring that governments which "act contrary to their Trust . . . put themselves into a state of War with the People, who are thereupon absolved from any farther Obedience."⁴³

More generally, Locke posited that the original position of humanity was a "state of nature"—a social existence without government—in which people possessed certain inalienable rights, but that out of "strong obligations of necessity, convenience and inclination," people constitute governments.⁴⁴ The social contract⁴⁵ thus made involves the surrender of some individual rights in order to secure the remainder more effectively. The gospel of the Lockean social contract—"[n]atural rights and the social compact, government bounded by law and incapable of imparting legality to meas-

38. *Id.* at 527-28 n.28.

39. Corwin, *supra* note 5, at 399 n.108.

40. For discussion of the problematic status of judicial review in the last quarter of the eighteenth century, see *infra* notes 86-104 and accompanying text.

41. Corwin, *supra* note 5, at 395-404.

42. McDONALD, *supra* note 14, at 60.

43. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 430 (Peter Laslett ed., 1967) (Book 2, §§ 221-22). Peter Laslett's edition is the definitive work, containing his invaluable introduction, but I will also provide parenthetical citations to Locke's book and section numbers, to aid the reader in finding cited material in other editions of Locke's works.

44. *Id.* at 336-37 (Book 2, § 77).

45. Strictly speaking, there was "no contract as such, only a network of forced exchanges designed to leave everyone better off than before." RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 11 (1985).

ures contrary to law, and the right of resistance to illegal measures"—was regularly preached by colonial, particularly New England, clergy, who used their pulpits as much for political as theological instruction.⁴⁶

Locke contended that the legislature was the supreme and exclusive lawgiver of the political commonwealth,⁴⁷ a position that Helen Michael has taken to mean a complete repudiation of any constitutional judicial review, whether based on positive or natural constitutional law.⁴⁸ While that may be the logical result of Locke's statements, Americans blithely took liberties with the Lockean canon. Locke's political theory was frequently fused with Coke's jurisprudentialism to produce a peculiarly American brand of constitutionalism. Edward Corwin contended that "the Massachusetts Circular Letter of 1768 . . . perfects the blend of Coke and Locke"⁴⁹ by its assertions that, while "Parliament is the supreme legislative power . . . [it] derives its power and authority from the constitution, . . . [which] ascertains and limits both sovereignty and allegiance."⁵⁰ Significantly, the Massachusetts colonists also contended that "essential, unalterable right[s], in nature, [were] engrafted into the British constitution, as a fundamental law, and ever held sacred and irrevocable by the subjects within the realm."⁵¹

The Massachusetts Circular Letter was more than a mingling of Locke and Coke; it was also alloyed with the Continental Enlightenment. Vattel, for example, was quite explicit in his assertion that the legislative and executive authority of government is subordinate to "the fundamental laws of the state."⁵² Both Pufendorf and Burlamaqui contended that the sovereign was bound by natural law and that, should the sovereign violate natural law, the people were entitled to revolt to enforce their natural rights.⁵³ Grotius was more equivocal, for he flirted with the oxymoronic idea that people could alienate their inalienable rights⁵⁴ but simultaneously expressed the

46. Corwin, *supra* note 5, at 396.

47. LOCKE, *supra* note 43, at 374 (Book 2, § 134).

48. Michael, *supra* note 6, at 436.

49. Corwin, *supra* note 5, at 400.

50. *Id.* (quoting Massachusetts Circular Letter of 1768).

51. *Id.*

52. EMER VATTEL, *THE LAW OF NATIONS* 15 (John Chitty trans., 1849); *see also id.* at 8-22 (Book I, Ch. 3 & 4) (discussing generally limits upon authority of prince and legislature).

53. SAMUEL PUFENDORF, *OF THE LAW OF NATURE AND NATIONS* 1068-72, 1105-11 (C.W. & W.A. Oldfather trans., 1964); 2 JEAN J. BURLAMAQUI, *THE PRINCIPLES OF NATURAL LAW AND POLITIC LAW* 37 (Thomas Nugent trans., 1807).

54. HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 103-04 (Francis W. Kelsey trans., 1964) (Book I, Ch. III, § VIII(1)).

presumption that people could not part with the right to resist a sovereign's misconduct.⁵⁵

The colonial alloy was peculiar to America. It fused Lockean and Continental notions of natural law as a limit upon sovereignty (albeit one not susceptible of judicial enforcement) with the Cokean notion that judicial review was an appropriate and legitimate mechanism by which to enforce these limiting principles of fundamental law. While Lockean and Continental enlightenment political theory, *standing alone*, might "undermine . . . [the view] that judicial review was a logical outgrowth of the diverse natural law tradition that the American colonists embraced,"⁵⁶ the importance of these theories is that they cannot be considered in isolation. Just as birds use wildly disparate elements to construct their nests, the colonists fashioned their applied political theory from similarly incongruous sources. Colonial lawyers transformed their sources, rather than being constrained by them. It is myopic to think that they hewed carefully to the logical limits of the theories they embraced. These were men on a mission who were impatient with the intellectual details that pre-occupy the modern, detached observer.

The Radical Egalitarians

Among the other influences upon colonial political thought were a number of disparate egalitarian thinkers: radical Whigs like John Trenchard and Thomas Gordon (the authors of *Cato's Letters*),⁵⁷ the Protestant clergy of colonial America,⁵⁸ the Scottish Enlightenment,⁵⁹ and such American radicals as Thomas Paine. As with Locke and the Continental natural law scholars, Americans absorbed these influences and put them to their own purposes.

55. *Id.* at 149 (Book I, Ch. IV, sec. VII(2)).

56. Michael, *supra* note 6, at 432.

57. See THE ENGLISH LIBERTARIAN HERITAGE FROM THE WRITINGS OF JOHN TRENCHARD AND THOMAS GORDON (David L. Jacobsen ed., 1965) [hereinafter TRENCHARD & GORDON]. *Cato's Letters* were written about 1720.

58. See generally ALICE M. BALDWIN, THE NEW ENGLAND CLERGY AND THE AMERICAN REVOLUTION (1928); Edmund Morgan, *The Puritan Ethic and the American Revolution*, 24 WM. & MARY Q. 3 (1967).

59. See GREENE, *supra* note 14, at 45-52; McDONALD, *supra* note 14, at 54-55. Perhaps the most vigorous champion of the influence of the Scottish Enlightenment upon American political thought has been Garry Wills. See GARRY WILLS, INVENTING AMERICA: THOMAS JEFFERSON'S DECLARATION OF INDEPENDENCE (1978). Some scholars sharply dispute the influence that Wills attributes to the Scottish Enlightenment. See, e.g., Ronald Hamowy, *Jefferson and the Scottish Enlightenment: A Critique of Garry Wills's Inventing America: Thomas Jefferson's Declaration of Independence*, 36 WM. & MARY Q. 503, 509 (1979); Harry Jaffa, *Inventing the Past: Garry Wills's Inventing America and the Pathology of Ideological Scholarship*, 33 ST. JOHN'S L. REV. 3 (1981).

Trenchard and Gordon were, in a sense, radical Lockeans. They contended that political society rested on a compact between the people and their governmental agents,⁶⁰ relied on the legislative agents of the people to safeguard their liberties,⁶¹ but recognized that the legislature was subject to the limits of fundamental law.⁶² Like Pufendorf and Burlamaqui, Trenchard and Gordon believed that the remedy for legislative action infringing upon fundamental law was to hold frequent elections⁶³ and, if necessary, revolution.⁶⁴

The Protestant clergy of colonial America "taught their flocks political theory . . . [and, a]fter the Bible, Locke was the principal authority relied on by the preachers" ⁶⁵ While the colonial clergy consisted of New England Puritans, Southern Anglicans, and dissenters of all kinds, their message was the familiar one of "[n]atural rights and social compact, government bounded by [fundamental] law, . . . and the right of resistance to illegal measures" ⁶⁶ To be sure, there were disturbing notes of extreme egalitarianism sounded by George Whitefield, the preacher at the center of the "Great Awakening" of the mid-eighteenth century. While more established clerics recoiled from Whitefield's challenge to authority, his message resonated with the mass of colonial Americans and contributed to the doctrinal cacophony that makes it so difficult to assess today some shared intention with respect to any given practice or principle.

The Scottish Enlightenment thinkers were, perhaps, the most radical of all. They argued that all people are endowed with equal capabilities for moral reasoning and, as a result, concluded that this inherent, natural moral equality dictated political equality.⁶⁷ This sentiment, echoed in the Declaration of Independence's assertion that "all men are created equal," was "but a short step to radical

60. TRENCHARD & GORDON, *supra* note 57, at 128 (Gordon, Letter No. 62, Jan 20, 1721).

61. *Id.* at 121 (Trenchard, Letter No. 60, Jan. 6, 1721).

62. See WOOD, *supra* note 14, at 291-92.

63. TRENCHARD & GORDON, *supra* note 57, at 121 (Trenchard, Letter No. 60, Jan. 6, 1721).

64. See WOOD, *supra* note 14, at 292.

65. Corwin, *supra* note 5, at 396.

66. *Id.*

67. See, e.g., BAILYN, *supra* note 14, at 303 (discussing erosion of hierarchical society); McDONALD, *supra* note 14, at 87-89 (discussing effect of sumptuary laws on federalist system); WILLS, *supra* note 59, at 228; WOOD, *supra* note 14, at 118 (noting moral component of American Revolutionary thought).

democracy,"⁶⁸ in which "the spirit of the law . . . [should] be considered . . . only on appeal to the representatives of the people."⁶⁹

Radical egalitarianism was much in evidence in Thomas Paine's *Common Sense*.⁷⁰ Paine asserted that "the equal rights of nature" compelled the conclusion that government should be perfectly egalitarian.⁷¹ In short, Paine espoused an unvarnished majoritarianism, in which there would be "no distinctions" and thus "no superiority" among those composing the polity.⁷²

In one important sense, all of these egalitarian components of colonial political theory were at odds with Cokean jurisprudentialism. While the egalitarians and Coke might agree that the "law of nature is part of the laws of England . . . [and] is that which God at the time of creation . . . infused into his heart,"⁷³ they would be far less likely to concur that only those "schooled in the artificial reason and judgment of the law"⁷⁴ were entitled to decide when legislation contravened the fundamental law of nature.

The Application of Diverse Political Theory

The Revolutionary generation simultaneously employed two conceptions of how fundamental natural law could be used to protect human liberty. The jurisprudential strain associated with Coke and his forebears relied upon judges to invoke natural law to check executive and legislative abuses. An admixture of the continental natural law thinkers and various radical egalitarians counseled colonial Americans to rely instead upon majoritarian democracy to discern and apply the fundamental principles of natural law.

Neither of these visions can be said to have wholly captured the Revolutionary imagination. As Forrest McDonald has observed, in-

68. McDONALD, *supra* note 14, at 54.

69. WOOD, *supra* note 14, at 301-02.

70. The tract is partially reprinted in JOSEPH LEWIS, THOMAS PAINE: AUTHOR OF THE DECLARATION OF INDEPENDENCE 55-80 (1947).

71. *Id.* at 59-70.

72. *Id.* at 70.

73. Calvin's Case, 77 Eng. Rep. 377, 392 (K.B. 1609).

74. Prohibitions del Roy, 77 Eng. Rep. 1342, 1343 (K.B. 1609). This is, of course, one of the celebrated moments in legal history: Coke's temerity in telling James I to his face that he lacked sufficient "artificial reason and judgment" to decide matters of law. Coke was not breaking new ground; he was squarely in the tradition of such earlier English lawyers as Sir John Fortescue, Henry IV's Chief Justice. In his renowned work, *De Laudibus Legum Angliae* (Praises of the Laws of England), he instructed the imaginary Prince that he will "not need to explore the mysteries of the law of England by long study; . . . [or] to investigate precise points of the law . . . , but these should be left to your judges . . . , [since] the experience of [law] necessary for judges is scarcely attainable in the labours of twenty years." JOHN FORTESCUE, *DE LANDIBUS LEGUM ANGLIE*, 23, 25 (S.B. Chrimes trans. & ed., Cambridge Univ. Press, 1949) (n.p., n.d.).

dependence produced only the temporary triumph of the radical egalitarian approach.⁷⁵ The initial reaction to independence was enthusiastic embrace of a radical vision of majoritarian democracy, but within a short time this vision began to be supplanted or augmented by the Cokean jurisprudential notions of political arrangement. A representative sample of political events from revolutionary America provides some telling and paradigmatic examples of the evanescence of radical egalitarianism.

The Revolutionary Pennsylvania Constitutions

In 1776, Pennsylvania adopted a constitution which reflected the ideals of radical democracy.⁷⁶ It relied almost exclusively upon the legislature to conduct the popular will into governmental action. There was no governor; rather, executive functions were to be performed by a popularly elected committee.⁷⁷ The legislature controlled the tenure of judges, who in any case could only serve for seven years.⁷⁸ "[T]o make the legislature more responsive to its theoretical master, the people, Pennsylvania required annual elections of representatives, required representatives to subject their acts to the instructions of their constituents, and required the legislature to submit proposed legislation to popular review."⁷⁹ The political climate which produced Pennsylvania's 1776 constitution and others imbued with its revolutionary zeal was one in which "few Americans except lawyers trusted a truly independent judiciary"⁸⁰ or, for that matter, a strong executive or even a legislature much distanced from the people. It is likely correct to observe of these manifestations of revolutionary political doctrine that "the notion that the judges should be so independent as to have power to . . . pass upon the constitutionality of laws enacted by the legislative

75. McDONALD, *supra* note 14, at 59.

76. See 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3081-92 (Francis N. Thorpe ed., 1909) (Pa. Declaration of Rights and Const. of 1776) [hereinafter Thorpe]. According to Stephen Presser, "[o]f all the state constitutions [adopted in the revolutionary period], Pennsylvania's was the purest application of revolutionary political theory to government." STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 115 (2d ed. 1989). Gordon Wood has declared that Pennsylvania's was "the most radical constitution of the Revolution." WOOD, *supra* note 14, at 85.

77. 5 Thorpe, *supra* note 76, at 3086-87 (PA. CONST. of 1776, § 19).

78. *Id.* at 3088 (PA. CONST. of 1776, § 23).

79. STEPHEN PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS, AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE 28 (1991) (footnote omitted).

80. McDONALD, *supra* note 14, at 85.

bodies was alien to [the egalitarian strain] of American theory and practice."⁸¹

The practical result of its 1776 constitution was to make Pennsylvania "the most unstable state in the country, . . . a sort of . . . late twentieth-century California."⁸² Accordingly, "[a]s a means of redressing this instability, Pennsylvania conservatives managed in 1790, to create a new state constitution modeled on that of the federal government . . . [and] reflect[ing] its framers' desire to lessen popular influence."⁸³ If Pennsylvania's 1776 constitution may be regarded as the prototypical revolutionary charter "establishing legislative supremacy," its 1790 constitution was characteristic of "the reaction to legislative supremacy . . . , [enabling] a new appreciation of the role of the judiciary in American politics."⁸⁴ As Gordon Wood has noted, "[b]y the 1780's the judiciary in several states . . . was gingerly and often ambiguously moving in isolated but important cases to impose restraints on what the legislatures were enacting as law."⁸⁵

Judicial Review by State Courts in the 1780s

Just as Pennsylvania sought by constitutional change to temper its radical egalitarianism, the nature of judicial review in the 1780s reflects a similar assimilation of radical egalitarianism and Cokean jurisprudentialism. Because American political theory was in flux during the decade it is not surprising that the handful of known instances in which state courts arguably asserted the power to invalidate legislation as contrary to fundamental law⁸⁶ have proven to be

81. *Id.*

82. PRESSER, *supra* note 79, at 30, 55.

83. *Id.* at 30.

84. WOOD, *supra* note 14, at 454.

85. *Id.* at 454-55.

86. There is general agreement that the list includes the following eight cases.

Josiah Philips's Case (Va. 1778), described in 2 WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 944-48 (1953); CHARLES G. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 89-92 (2d ed. 1959); 1 ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA* Appendix 293 (1803) [hereinafter TUCKER'S BLACKSTONE]; William P. Trent, *The Case of Josiah Philips*, 1 AM. HIST. REV. 444 (1896); Jesse Turner, *A Phantom Precedent*, 48 AM. L. REV. 321, 322 (1914).

Holmes v. Walton (N.J. 1780), described in CROSSKEY, *supra*, at 948-52; HAINES, *supra* at 92-95; Austin Scott, *Holmes v. Walton: The New Jersey Precedent: A Chapter in the History of Judicial Power and Unconstitutional Legislation*, 4 AM. HIST. REV. 456, 457 (1899).

Commonwealth v. Caton, 8 Va. (4 Call) 634 (1782), described in CROSSKEY, *supra*, at 952-61; HAINES, *supra*, at 95-98.

Rutgers v. Waddington (N.Y. City Mayor's Ct. 1784), reprinted in JULIUS GOEBEL, JR., *THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY* 393

susceptible to differing interpretations.⁸⁷ The meaning of these cases has been parsed before; I propose only a few additional observations.

Josiah Philips's Case

Josiah Philips was a notorious brigand during the Revolution. In May of 1778, the Virginia legislature passed a bill of attainder providing that, unless Philips surrendered himself prior to the end of June he would be automatically "convicted and attainted of high treason" and subjected to "the pains of death."⁸⁸ Philips was apprehended sometime in June, 1778, prior to the effective date of the attainder.⁸⁹ However, since he had not voluntarily surrendered himself, there must have been some uncertainty surrounding the applicability of the attainder. Philips was tried and convicted in accordance with ordinary common law procedures, rather than pursuant to the attainder.⁹⁰

Two radically different explanations have been offered for the failure to rely upon the attainder. According to St. George Tucker, "an associate of some of [Philips's] . . . judges . . . [and who] was familiar with the circumstances of the case,"⁹¹ Philips "was brought before the . . . court to receive sentence of execution pursuant to the [attainder] . . . [b]ut the court refused to pass the sentence and he was put upon trial according to the ordinary course of law."⁹² To

(1964), described in CROSSKEY, *supra*, at 962-65; HENRY B. DAWSON, *THE CASE OF ELIZABETH RUTGERS VERSUS JOSHUA WADDINGTON* (Mortisania, New York 1866); HAINES, *supra*, at 98-104, Sherry, *supra* note 5, at 1136-38.

Trevett v. Weeden (R.I. 1786), described in CROSSKEY, *supra*, at 965-68; HAINES, *supra*, at 105-12; JAMES M. VARNUM, *THE CASE, TREVETT V. WEEDEN: ON INFORMATION AND COMPLAINT, FOR REFUSING PAPER BILLS IN PAYMENT FOR BUTCHER'S MEAT, IN MARKET, AT PAR WITH SPECIE* (1787); Sherry, *supra*, note 5, at 1138-41; Charles Warren, *Earliest Cases of Judicial Review of State Legislation by Federal Courts*, 32 YALE L.J. 16 (1922).

Symsbury Case, 1 Kirby 444 (Conn. Super. Ct. 1785), described in CROSSKEY, *supra*, at 961; HAINES, *supra*, at 104.

Bayard v. Singleton, 1 N.C. (Mart.) 42 (1787), described in CROSSKEY, *supra*, at 971-74; HAINES, *supra*, at 112-20.

The "Ten-Pound Act" Cases (N.H. 1786), described in CROSSKEY, *supra*, at 969-71.

There is a ninth case, described by Haines as "a Massachusetts precedent," that is probably spurious. See HAINES, *supra*, at 120-21; see also CROSSKEY, *supra*, at 961-62.

87. Perhaps the leading advocate of the position that the American instances of judicial review in the 1780s are false precedents was W.W. Crosskey. See CROSSKEY, *supra* note 86, at 938-75; Michael, *supra* note 6, at 448-457. For the opposite view, see Sherry, *supra* note 5, at 1134-46.

88. CROSSKEY, *supra* note 86, at 944-45 (quoting Virginia legislation).

89. *Id.* at 945.

90. *Id.*; see also HAINES, *supra* note 86, at 90.

91. HAINES, *supra* note 86, at 91 n.6.

92. TUCKER'S BLACKSTONE, *supra* note 86, at 293.

Tucker, this was "decisive proof . . . of the independence of the judiciary."⁹³ Since the 1776 Virginia Constitution⁹⁴ contained no explicit prohibitions of bills of attainder, though it did contain explicit guarantees pertaining to trial procedures,⁹⁵ the judicial intervention described by Tucker might have been based, in part, on some unwritten conception of fundamental law that ranked on a par with the Virginia Constitution. The contrary explanation is that, since the bill of attainder had not become effective, there was no reason to do anything other than apply common law. On this view, "the case had nothing whatever to do with judicial review."⁹⁶

Whatever the actual explanation may have been for the failure to apply the legislative attainder to Philips, when *Philips's Case* became a subject of debate in the Virginia Ratification Convention the delegates who spoke to the matter uniformly, and wrongly, assumed that Philips had, in fact, been condemned pursuant to the attainder.⁹⁷ To William Crosskey, this was "sufficient to show that, among Virginians, in 1788, the Philips case was, very clearly, *not* regarded as a great landmark of judicial review."⁹⁸ That may well be so, for it was St. George Tucker, writing in 1803, who understood *Philips's Case* to be an instance of judicial review. Nevertheless, the Virginians of 1788 debated the validity of the attainder in terms of natural justice, a fact which suggests that they did not regard their written constitution of 1776 to have supplanted unwritten fundamental law. Patrick Henry, Governor of Virginia at the time of *Philips's Case*, defended

93. *Id.* Cf. EDWARD CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW: ITS LEGAL AND HISTORICAL BASIS AND OTHER ESSAYS* 71 (1914) (describing Tucker as "zealous champion of judicial review" and claiming his interpretation of case seeks "to create a precedent out of hand" and is a "myth").

94. 7 Thorpe, *supra* note 76, at 3812-19; See 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 48 (William F. Swindler ed., 1979) [hereinafter SOURCES AND DOCUMENTS].

95. 7 Thorpe, *supra* note 76, 3812-19. Section 8 of the 1776 Virginia Constitution provided that "in all capital . . . prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty." *Id.* at 3813; SOURCES AND DOCUMENTS, *supra* note 94, at 49. The legislative attainder of Philips would certainly seem to contradict these guarantees, although it seems possible, though implausible, that the provisions of this section could have been observed with the issue of fact for jury decision being limited to whether the legislative attainder applied to Philips.

96. See CROSSKEY, *supra* note 86, at 945; Turner, *supra* note 86, at 342.

97. See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 66-67 (Jonathan Elliot ed., 1836) (comments of Gov. Randolph) (hereinafter ELLIOT'S DEBATES); *id.* at 140 (comments of Mr. Henry); *id.* at 222-23 (comments of John Marshall); *id.* at 236 (comments of Mr. Harrison); *id.* at 298-99 (comments of Mr. Pendelton); *id.* at 450 (comments of Mr. Nicholas).

98. CROSSKEY, *supra* note 86, at 947.

the attaint as "justified by the laws of nature and nations."⁹⁹ Benjamin Harrison, chairman of the very House of Delegates that enacted the attaint, labeled Edmund Randolph's charges of its unconstitutionality "very unjust . . . [since Philips] was a man who, by the laws of nations, was entitled to no privilege of trial."¹⁰⁰ Edmund Pendleton attacked the attaint as "repugnant to the principles of justice[,] . . . contrary to the Constitution, and the spirit of the common law."¹⁰¹

The Virginians' misunderstanding of their own contemporary history might indicate that they did not regard the case as an instance of judicial review, but it certainly underscores their ready acceptance of natural law as coexisting with a written constitution. It may well be Tucker's gloss that caused a later generation to regard the case as an example of judicial review; or it may be that Tucker simply recorded a common understanding that came later; or it may be that Tucker, one of the foremost legal commentators and scholars of late eighteenth and early nineteenth century Virginia, accurately described an early, *and advisory*, instance of judicial review. If the latter explanation is correct, perhaps the Virginians' treatment of *Philips's Case* in the ratification debates reflects the advisory nature of the judicial opinion. On this view, the Virginia courts simply advised counsel that prosecution under the attainder would violate fundamental law, whether rooted in the Virginia Constitution or in principles of natural justice. Even though counsel heeded that advice, the Virginia delegates found it politically expedient to debate the legitimacy of the legislative act that went unenforced.

Though clouded by misunderstanding in 1788, it is clear that by 1803, when the influential Tucker wrote, *Philips's Case* had begun to be understood as an early exemplar of judicial review.¹⁰² That this may have been due to what Crosskey derisively described as the "oral tradition and the transient memories of judges and lawyers"

99. ELLIOT'S DEBATES, *supra* note 97, at 140.

100. *Id.* at 236.

101. *Id.* at 299.

102. See HAINES, *supra* note 86, at 91-92; ANDREW C. McLAUGHLIN, THE COURTS, THE CONSTITUTION AND PARTIES: STUDIES IN CONSTITUTIONAL HISTORY AND POLITICS 48 (1912) (asserting that contemporary observers may have regarded the case as one "in which the court asserted its independent right to interpret the constitution") That this may have been due to what Crosskey derisively described as the "oral tradition and the transient memories of judges and lawyers" does not diminish its effect. The oral tradition and transient memories reflect the current importance of past events. The importance of *Philips's Case* lies not so much in what actually transpired as in what the immediately following generation thought happened.

does not diminish its effect.¹⁰³ Oral traditions and transient memories reflect the current importance of past events. The importance of *Philips's Case* lies not so much in what actually transpired as in what the immediately following generation thought happened. Whatever the "true" understanding, *Philips's Case* epitomizes the transformative nature of political thought in the 1780's, a time in which radical egalitarianism (which treated natural law as a principle capable of apprehension only by democratic legislatures) became intermingled with the Cokean jurisprudentialism that regarded the judiciary as the guardian of individual rights (whether derived from written or unwritten fundamental law). It is no surprise that St. George Tucker should have been an agent of that transformation with respect to *Philips's Case*, since he regarded judicial review as indispensable for the preservation of human liberty.¹⁰⁴

Holmes v. Walton

In 1778, the New Jersey legislature enacted a statute designed to prevent trading with the enemy, by providing for forfeiture of goods taken in such trade. The statute, as applied, provided for a six-man jury trial. The New Jersey Constitution preserved the jury trial right, and prior practice applicable to cases of the type at issue was to require a twelve-man jury. The New Jersey Supreme Court reversed the conviction and remanded for a new trial. Crosskey contended that the court did so because it found the trial judge's interpretation of the statute to be in error,¹⁰⁵ but Crosskey admitted that his conclusion is only a weighing of probabilities. We do know that the New Jersey Supreme Court reversed the conviction and that it was urged to do so on the grounds that trial by six-man jury was "contrary to law, . . . the constitution of New Jersey, . . . [and the] practices . . . of the land."¹⁰⁶ Fused together in this argument without attempt to distinguish between them were appeals to custom, reason, and written and unwritten fundamental law. As James Whitman has pointed out, this form of discourse—the intermingling of sources of fundamental law—was characteristic of the revolutionary generation.¹⁰⁷

103. CROSSKEY, *supra* note 86, at 948 (quoting 1 ZEPHANIAH SWIFT, SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 1 (1795)).

104. See TUCKER'S BLACKSTONE, *supra* note 92, at 357.

105. CROSSKEY, *supra* note 86, at 950.

106. Scott, *supra* note 86, at 458.

107. See generally Whitman, *supra* note 16, at 323 (discussing Revolutionary era legal practice).

We also know that the New Jersey Supreme Court was understood by contemporary observers to have declared the act unconstitutional. Residents of Monmouth County, where the case arose and was tried, petitioned the New Jersey legislature to complain "that the justices of the Supreme Court have set aside some of the laws as unconstitutional."¹⁰⁸ In neighboring Pennsylvania, Gouverneur Morris argued to the legislature that it would be unconstitutional for it to abolish a bank charter, and invoked *Holmes v. Walton* for the proposition that Pennsylvania judges possessed the power to declare legislation unconstitutional.¹⁰⁹

There can be little doubt that, during the 1780s, *Holmes v. Walton* "was commonly regarded as a precedent for judicial review."¹¹⁰ It is also likely true that "there was, at that time, hostility to the whole idea of judicial review."¹¹¹ The two positions provide further illustration of the turbulence of political thought in the 1780s. Radical egalitarianism, exemplified by legislative supremacy, was beginning to shatter into a more complicated mosaic including, among other things, Cokean jurisprudentialism.

Commonwealth v. Caton

The defendants in this 1782 case were convicted of treason under a 1776 Virginia statute that vested the pardon power in both houses of the Virginia legislature. The House of Delegates voted to grant a pardon but the Senate refused. The defendants appealed to the Virginia Supreme Court of Appeals, contending that the statute was contrary to the Virginia Constitution.¹¹² The court found the statute to be in accord with the constitution¹¹³ but, in dicta, seven of the eight judges "were of opinion, that the court had power to declare

108. Votes and Proceedings of N.J. Assembly 52 (Dec. 8, 1780), *quoted in* HAINES, *supra* note 86, at 93.

109. See 3 SPARKS, *THE LIFE OF GOVERNOR MORRIS, WITH SELECTIONS FROM HIS CORRESPONDENCE AND MISCELLANEOUS PAPERS* 438 (Boston, 1832), *quoted and discussed in* CROSSKEY, *supra* note 86, at 951-52.

110. CROSSKEY, *supra* note 86, at 952.

111. *Id.*

112. *Id.* at 952-53; HAINES, *supra* note 86, at 95-97. The relevant provision of the Virginia Constitution vested the pardon power in the Governor "except where . . . the law shall otherwise particularly direct; in which cases, no . . . pardon shall be granted, but by resolve of the House of Delegates." 7 Thorpe, *supra* note 76, at 3817.

113. The conclusion is debatable, given the clear constitutional reference to the House of Delegates. It is possible that the court was influenced in its decision by the fact that the House of Delegates apparently thought it necessary to secure the Senate's approval, or the Delegates would not have forwarded the pardon to the Senate for action. See CROSSKEY, *supra* note 86, at 955.

any resolution or act of the legislature . . . to be unconstitutional and void."¹¹⁴

Were the power of judicial review to have been exercised in *Caton*, it would have been exercised with reference to a written constitution. However, certain of the rhetoric employed by George Wythe suggests that he, at least, might, in the proper case, have regarded himself as entitled to range well beyond the written Constitution to void legislative actions violative of unwritten fundamental law. Wythe invoked the Cokean proposition that it was the duty of the judge "to protect the rights of the subject against the encroachment of the Crown" in order to declare that it was "equally [his duty] to protect . . . the whole community against [legislative] usurpations."¹¹⁵ When speaking in revolutionary America of the "encroachment[s] of the Crown," Wythe could not possibly be thought to mean abuses wrought personally by the King; rather, the thrust of revolutionary animus was directed toward the claimed invalidity of legislation of the imperial Parliament.¹¹⁶ Thus, when he invoked the power of *English* judges "to protect a solitary individual against the rapacity of the sovereign" he called upon a power rooted, if anywhere, in English traditions of an unwritten constitution.

Commonwealth v. Caton reflects the embryonic and tentative character of judicial review in the transformative 1780s. Just as in *Philips's Case*, where judicial review is likely to have assumed a purely advisory, and non-binding character, *Caton* is another example of judges claiming the power of judicial review without actually attempting to enforce the claim. It is reasonable to expect judicial review in the 1780s to assume that shape as revolutionary America groped toward a political *rapprochement* between the revolutionary ideal of democratic legislative supremacy and the other revolutionary tradition of fundamental law, rooted in a mixture of sources, as a judicially enforceable check upon legislative abuse.

Rutgers v. Waddington

Elizabeth Rutgers sued Joshua Waddington, a British subject, for trespass resulting from his possession of her malthouse pursuant to an order of the British military authorities in occupied New York. Rutgers's claim was founded on a New York statute that barred the

114. 8 Va. (4 Call) at 6, *quoted in* CROSSKEY, *supra* note 86, at 953.

115. 8 Va. (4 Call) at 7, *quoted in* HAINES, *supra* note 86, at 96.

116. See generally EDMUND S. MORGAN, *INVENTING THE PEOPLE* 239-45 (1988) (describing Colonists' rejection of Thomas Whatley's secretary in the British Treasury office, on theory that Parliament could tax the colonists because they were "virtually," if not actually, represented).

defense that the trespass was ordered by the military occupation authorities. However, this statute was arguably contrary to the law of nations, which recognized the right of captors to use captured real estate; the 1783 Peace Treaty between the United States and the United Kingdom, which contained mutual releases of claims such as Rutgers's; and the Articles of Confederation.¹¹⁷

The court employed an artful dodge that seems typical of the period. It repeated the obligatory pieties about legislative supremacy,¹¹⁸ declared that it was merely interpreting the statute to avoid unintended conflict with the law of nations or the Peace Treaty, and proceeded to uphold the statute but to deny relief. In short, the court exercised a judicial power that "it specifically declared no court had power to [exercise]."¹¹⁹ Moreover, the court identified the problem as the conflict between the statute and the law of nations, which it "equated . . . with the law of nature."¹²⁰ Thus, the court's de facto exercise of judicial review was founded on unwritten fundamental law.

Rutgers differed from the prior cases in that judicial review was not advisory or hortatory. The court actually exercised the power, though it clumsily sought to camouflage the fact, no doubt due to the charged political atmosphere resulting from the reappraisal of radical egalitarianism. Accordingly, it is not surprising that, like *Holmes v. Walton*, the decision spawned protests of the claimed usurpation of legislative power.¹²¹ Nor is it surprising that the case was widely reported at the time,¹²² for it was vividly emblematic of the movement toward greater judicial control of legislatures in the name of fundamental law.

Trevett v. Weeden

Rhode Island imposed a penalty on all persons who refused to accept paper money in discharge of their obligations, and permitted no jury trial for prosecutions seeking to enforce the penalty. John Weeden contended that the statute was void because the denial of

117. See CROSSKEY, *supra* note 86, at 962-63; HAINES, *supra* note 86, at 98-99.

118. The court imitated Blackstone almost verbatim in declaring that, if the legislature "think[s] fit positively to enact a law, there is no power which can control them." DAWSON, *supra* note 86, at 40, *quoted in* HAINES, *supra* note 86, at 99; *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 91 (1765) ("[I]f the Parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it.").

119. CROSSKEY, *supra* note 86, at 964.

120. *See* Sherry, *supra* note 5, at 1138; *see also* Goebel, *supra* note 86, at 400, 404.

121. *See* CROSSKEY, *supra* note 86, at 964.

122. *Id.* at 964-65.

the jury trial right was contrary to fundamental law.¹²³ Because Rhode Island had no written constitution, Weeden's claim was a pure appeal to the primacy of unwritten fundamental law. The court granted the appeal and dismissed the complaint, noting cryptically that the claim was not "cognizable" before it.¹²⁴ Despite the enigmatic disclaimer, the people of Rhode Island regarded the court as having declared the act unconstitutional. The legislature thought so too, for it summoned the judges before it for an explanation which, once delivered, was both "highly technical"¹²⁵ and wildly improbable. The judges explained that, although Weeden's plea had been that the statute was void due to its repugnance to unwritten fundamental law, they had merely decided that the claim was not cognizable, without specifying the reasons for the defect. "Whatever might have been the opinion of the Judges, they spoke by their records, which admitted of no addition or diminution."¹²⁶ The judges convinced nobody. The legislature refused to reappoint them,¹²⁷ the case was widely reported at the time as an example of judicial review based on unwritten fundamental law,¹²⁸ and even Professor Crosskey, a vehement critic of judicial review, characterized the judges' explanation as "mask[ing] their actual action."¹²⁹ Once again, the case illustrates the Janus-like nature of judicial review in the 1780s. Radical egalitarians denounced the thought of judicial enforcement of fundamental law, whatever its source; judges sought to preserve judicial review by indirection and obfuscation; and the people appreciated both the fact of the phenomenon and its possibilities for preserving human liberty.

Bayard v. Singleton

A North Carolina statute authorized judges, acting without juries, to determine title to property seized from loyalists and later sold. Bayard brought suit in ejectment to recover certain confiscated property and Singleton moved for dismissal of the action. The court, "after pretty clearly intimating its belief that the act . . . was unconstitutional,"¹³⁰ delayed its "decision for about a year and attempted to secure a compromise which would avoid a conflict be-

123. See Varnum, *supra* note 86, at iv, xxi, quoted in HAINES, *supra* note 86, at 105-06.

124. CROSSKEY, *supra* note 86, at 966.

125. *Id.*

126. *Id.* at 967 (quoting records of Rhode Island legislature).

127. *Id.* at 968.

128. *Id.* at 965-66.

129. *Id.* at 968.

130. *Id.* at 971.

tween the law and the constitution.”¹³¹ The court finally denied Singleton’s motion to dismiss, noting that “no act [the legislature] could pass, could by any means repeal or alter the constitution,”¹³² and submitted the case to a jury, which promptly found for Singleton.

Bayard is clearly an instance of the exercise of judicial review, albeit based upon a written provision of the North Carolina Constitution. It is possible that the *Bayard* court might also have felt entitled, in the proper case, to invalidate legislation as contrary to unwritten fundamental law.¹³³ The North Carolina court was not called upon to do so, however, and thus confined itself to enforcing the supremacy of the written constitution. Like the other instances of judicial review in the 1780s *Bayard* engendered substantial public opposition,¹³⁴ reflecting the unsettled climate of political thought and the transitional stage from radical legislative egalitarianism to judicial constraint of the legislature.

The state precedents from the 1780s establish that judicial review was employed haltingly, sparingly, and with knowledge that its use would inspire popular opposition from dedicated radical egalitarians. Sometimes, as in *Philips’s Case* and *Commonwealth v. Caton*, judicial review was claimed rhetorically but not sought to be enforced. The remaining occasions discussed are all instances in which judicial review was actually asserted, although in *Rutgers v. Waddington* and *Trevett v. Weeden* the judges sought to deny or obscure their true object. When lawyers urged judges to void legislation as repugnant to fundamental law they were not careful to distinguish between written and unwritten sources of fundamental law. Indeed, the actual instances of judicial review reflect the advocates’ haphazardness on this point.¹³⁵ *Trevett v. Weeden* and *Rutgers v. Waddington* are both examples of judicial review based on unwritten fundamental law, *Holmes v. Walton* is an uncertain precedent, and *Bayard v. Singleton* is rooted in the written constitution of North Carolina. All of the decisions produced popular discontent from the disciples of radical egalitarianism, yet the decisions have endured and were cited by neo-Cokeans as examples of the judiciary’s role as defender of human liberty.

131. HAINES, *supra* note 86, at 113 (footnote omitted).

132. 1 N.C. (Mart.) 7 (1787).

133. See Sherry, *supra* note 5, at 1143.

134. CROSSKEY, *supra* note 86, at 972-73.

135. James Whitman argued that this haphazardness was characteristic of the mingled discourse of the age, one in which distinctions were not made between custom and reason, or between natural law and positive law. See Whitman, *supra* note 16, at 1324-29.

While some commentators treat the popular opposition to these precedents as evidence that judicial review—whether grounded in written or unwritten fundamental law—was certainly not accepted at the time of the constitutional bargain in 1787,¹³⁶ they overlook the basic fact that the 1780s were a time of intense upheaval and transition. John Adams had declared that “the child independence was born” by James Otis’s invocation in 1760 of Coke and the power of judicial review.¹³⁷ The sustenance of the newborn was, however, radical egalitarianism embodied by the supreme legislature. That experiment soured, and the 1780s represent the groping of revolutionary America toward a political structure that sought to secure revolutionary ideals in a more mature, sophisticated, and multi-dimensional fashion. The transition that occurred in that decade was a blending of these revolutionary themes. Amid the fading bloom of revolutionary radical egalitarianism it is not surprising to find judges exercising the power of judicial review obliquely and tentatively. Nor is it surprising that even such indirect attempts to curtail legislative abuse were often greeted with public anger and resentment. The outcome, which could be only dimly foreseen in the 1780s, was a fusion of radical egalitarianism with Cokean jurisprudentialism. It is thus vain to pretend that, by reading the tea leaves of the 1780s, we can be certain that *any single aspect* of those transitional times was of such paramount importance that it ought to be the rule of decision for today.

Judicial Review by State and Federal Courts after 1789

If the 1780s, leading up the 1787 Convention and resultant federal Constitution, were a time of tumultuous transition in political thought, the period after 1789 produced a much clearer picture of acceptance of both the idea of judicial review and its employment as a device to insure the supremacy of both written and unwritten fundamental law. A brief review of some salient precedents will capture the flavor of the period.

State Precedents

In *Ham v. M’Claws*,¹³⁸ proceedings were brought to forfeit slaves imported into South Carolina in violation of a South Carolina statute. The slaveowners conceded the statutory violation but contended that, because they were induced to settle in South Carolina

136. See CROSSKEY, *supra* note 86, at 944-74; Michael, *supra* note 6, at 455-57.

137. 10 ADAMS, LIFE AND WORKS 248 (C.F. Adams ed., 1850), *quoted in* Corwin, *supra* note 5, at 398.

138. 1 S.C.L. (1 Bay) 38 (1789).

in reliance upon then existing law, and could not possibly have known of the recent alteration of the law, the statute should be regarded as contrary to "the rules of common right and justice."¹³⁹ Counsel argued quite specifically that "statutes made against natural equity are void."¹⁴⁰ The court agreed, charging the jury that "[i]t is clear, that statutes passed against the plain and obvious principles of common right and common reason, are absolutely void, as far as they are calculated to operate against those principles."¹⁴¹ The court's embrace of Cokean principles of natural law and reason as authority for invalidation of the statute could hardly have been warmer.

In *Kemper v. Hawkins*,¹⁴² the Virginia Supreme Court concluded that a Virginia act reorganizing judicial districts was void since it was contrary to the Virginia Constitution. In seriatim opinions, the court concluded that, where legislation and the Constitution collided, it was the judicial duty "to decide that the act is void."¹⁴³ Similarly, Spencer Roane "conclude[d] that the judiciary . . . ought to adjudge a law unconstitutional and void, if it be plainly repugnant to the letter of the Constitution, or the fundamental principles thereof."¹⁴⁴ Lest there be any doubt about the relationship between the written Constitution and the unwritten fundamental principles appurtenant to constitutional text, Roane explained that fundamental principles were "those great principles growing out of the Constitution . . . ; those land-marks, which it may be necessary to resort to, on account of the impossibility to foresee or provide for cases within the spirit but without the letter of the Constitution."¹⁴⁵

In *Bowman v. Middleton*,¹⁴⁶ a South Carolina statute transferring title to real property from one party to another was invalidated since "it was against common right . . . to take away the freehold of one man and vest it in another."¹⁴⁷ Therefore, "the act was . . . void; and . . . no length of time could give it validity, being originally founded on erroneous principles."¹⁴⁸ Once again the power of con-

139. *Id.* at 39.

140. *Id.*

141. *Id.*

142. 1 Va. (1 Va. Cas.) 11 (1793).

143. *Id.* at 31 (Nelson, J.).

144. *Id.* at 40 (Roane, J.) (emphasis added).

145. *Id.* Speaking in similar tone were Judges Henry, Tyler, and Tucker. *See id.* at 65-66 ("[T]he law is unconstitutional . . . and this opinion I form . . . from honest reason, common sense, and the great letter of a Free Constitution.").

146. 1 S.C.L. (1 Bay) 101 (1792).

147. *Id.*

148. *Id.*

stitutional judicial review was squarely related to the primacy of unwritten fundamental law.

To similar effect is *Merrill v. Sherburne*¹⁴⁹ in which the New Hampshire courts struck down legislation which awarded a litigant a new trial. The court concluded that the statute offended the New Hampshire Constitution because it both usurped the judicial function and was retrospective in its effect, but the court was sufficiently unsure of the specific constitutional textual foundation for its conclusion that it felt compelled to rest the decision "upon general principles."¹⁵⁰

These state precedents are but the tip of the iceberg. Charles Haines has collected another two dozen state precedents from the period in which state courts declared legislation to be void as contrary to written constitutions or "against the law of nature."¹⁵¹ It is hardly surprising that Haines concluded that,

By a gradual development the American doctrine of judicial review of legislation had emerged through colonial and state precedents and dicta of judges into a fairly well understood and accepted principle. Referring on some occasions to an overruling law of nature, on other occasions to the fundamental principles embodied in the great English charters of liberties, and, finally, to formally enacted written instruments, colonial and state courts steadily asserted and maintained the right to invalidate acts, and thus they promulgated for the United States and put into an effective form Coke's theory of the supremacy of the courts.¹⁵²

Federal Precedents

The contemporaneous federal precedents paint a similar picture. Well before the power of judicial review was definitively claimed in *Marbury v. Madison*,¹⁵³ the Supreme Court had indirectly asserted the power and some of the lower federal courts had explicitly ruled legislation invalid on constitutional grounds.

In *Hayburn's Case*,¹⁵⁴ five of the six justices, in their capacities as circuit justices, "rendered a decision for the first time holding an

149. 1 N.H. 199 (1818).

150. *Id.* at 211.

151. HAINES, *supra* note 86, at 168 (quoting *Dupy v. Wickwire*, 1 D. Chip. 237-39 (Vt. 1814)); see *id.* at 148-70 for discussion of these cases.

152. HAINES, *supra* note 86, at 169 (footnote omitted).

153. 5 U.S. (1 Cranch) 137 (1803).

154. 2 U.S. (2 Dall.) 409 (1792). Though the justices decided the case in their various capacities as circuit judges, they did not write opinions. Alexander Dallas's report is of their letters to President Washington, explaining their refusal to decide. See also HAINES,

Act of Congress to be in violation of the Constitution.”¹⁵⁵ Congress had enacted legislation which authorized pensions for disabled war veterans.¹⁵⁶ The federal circuit courts were required to entertain applications and to certify to the Secretary of War those applicants found eligible. The Secretary, however, was free to disregard the judicial finding of eligibility and substitute his own judgment of ineligibility. The justices informed President Washington that it was impossible to entertain pension applications because (1) “the business directed by this act is not of a judicial nature . . . [and] the courts . . . must, consequently have proceeded without constitutional authority,” and (2) the power of the Secretary of War to revise judicial findings was “radically inconsistent with the . . . important principle [of judicial independence] which is so strictly observed by the Constitution of the United States.”¹⁵⁷

After the Eleventh Amendment overruled *Chisholm v. Georgia*¹⁵⁸ by stripping the federal courts of jurisdiction over suits against states brought by citizens of another state or country, the Supreme Court, in *Hollingsworth v. Virginia*,¹⁵⁹ dismissed all pending suits by citizens of one state against another. Even though the Eleventh Amendment had been ratified, § 13 of the 1789 Judiciary Act continued to authorize suits in federal court by citizens of one state against another.¹⁶⁰ The Court’s dismissal order, unaccompanied by an opinion, effectively treated that portion of § 13 as invalid law due to the supervening constitutional amendment. Accordingly, “*Hollingsworth* may put to flight the conventional wisdom that *Marbury v. Madison* was the first case in which the Supreme Court held an act of Congress unconstitutional.”¹⁶¹

supra note 86, at 173-79; 1 CHARLES WARREN, *THE SUPREME COURT IN AMERICAN HISTORY* 69-80 (1922); Max Farrand, *The First Hayburn Case, 1792*, 13 AM. HIST. REV. 281 (1908).

155. 1 WARREN, *supra* note 154, at 69.

156. Act of March 23, 1792, ch. 11, § 2, 1 Stat. 243, 244 (repealed by Act of Feb. 28, 1793, ch. 17, § 1, 1 Stat. 324).

157. 2 U.S. (2 Dall.) at 411. To similar effect is *Vanhome's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (C.C. Pa. 1795), in which Justice Paterson, riding circuit, charged a jury “that there can be no doubt, that every Act of the Legislature, repugnant to the Constitution, is absolutely void.” *Id.* at 309. Justice Paterson made it quite clear that this judicial power applied only to statutes offending the written Constitution. *Id.* at 308-10.

158. 2 U.S. (2 Dall.) 419 (1793).

159. 3 U.S. (3 Dall.) 378, 382 (1798).

160. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80.

161. DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 22 (1985).

In *Hylton v. United States*,¹⁶² a federal tax on carriages was attacked as an unconstitutional unapportioned direct tax. The Supreme Court unanimously upheld the validity of the tax by concluding that it was not a direct tax, but was silent on the "threshold question whether the Court had power to declare an act of Congress unconstitutional. . . . Thus the Court began to accustom the country to the fact of judicial review without proclaiming its power to exercise it."¹⁶³

By the time John Marshall asserted the power in *Marbury v. Madison*, its pedigree had already been well established. As Suzanna Sherry has pointed out,¹⁶⁴ Marshall's opinion in *Marbury* relied almost equally upon written and unwritten fundamental law to reach the conclusion that a portion of § 13 of the 1789 Judiciary Act was repugnant to the Constitution. Having concluded that William Marbury was entitled to his commission as a justice of the peace, Marshall concluded that Marbury was also entitled to a remedy, not because one had been given him by statute or the Constitution, but because the provision of remedies for violations of rights was "the very essence of civil liberty . . . [and] [o]ne of the first duties of government."¹⁶⁵ Evidently, the lack of a positive law source of a remedy would have violated some fundamental legal norm not to be found in the Holy Writ of the Constitution. The specific constitutional defect of § 13—the legislative authorization for the Court to assume original jurisdiction of suits seeking mandamus "to any . . . persons holding [federal] office"¹⁶⁶—was, however, an incongruity between the written Constitution and the congressional act.

Marshall's acceptance of natural law as a component of constitutional adjudication may be seen even more clearly in *Fletcher v. Peck*.¹⁶⁷ The 1795 Georgia legislature was bribed to convey vast tracts of public land¹⁶⁸ for less than two cents per acre. The following year a more virtuous legislature enacted legislation to cancel these so-called "Yazoo land grants." Fletcher, a successor in interest to an original Yazoo grantee, sued Peck, the immediate grantor, for breach of the covenant of good title. Fletcher contended that,

162. 3 U.S. (3 Dall.) 171, 172 (1796).

163. CURRIE, *supra* note 161, at 33. Justice Chase alone mentioned the issue, by saying that he did not need to address it since he found the statute constitutional. 3 U.S. (3 Dall.) at 175.

164. Sherry, *supra* note 5, at 1169-70.

165. 5 U.S. (1 Cranch) 137, 162-63 (1803).

166. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81.

167. 10 U.S. (6 Cranch) 87 (1810).

168. The acreage in question consisted of most of present-day Alabama and Mississippi.

since the Yazoo grants had been lawfully rescinded, Peck was in breach of his deed covenant.

The Supreme Court concluded that the Georgia legislature lacked the constitutional power to rescind its conveyance. In an opinion which "bristles with references suggesting unwritten limitations derived from natural law"¹⁶⁹ Marshall concluded that "Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States,"¹⁷⁰ from revoking the Yazoo grants. Justice William Johnson, concurring specially on this point, was even blunter: "I do it, on a general principle, on the reason and nature of things: a principle which will impose laws even on the Deity."¹⁷¹

All of this was evocative of Justice Samuel Chase's celebrated endorsement, in *Calder v. Bull*,¹⁷² of natural law as a principle by which judges may void legislation: "There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power. . . . An act of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."¹⁷³

The early federal period is thus replete with cases which document the steady trend toward rejection of revolutionary-era legislative supremacy and return to the earlier idea that Cokean jurisprudentialism was a preferred method by which to assure the continuation of individual rights.¹⁷⁴ In the course of this development, the cases rely upon both written and unwritten fundamental law as a basis upon which to void legislation. That fact is reflective of a continuation in the early federal period of the revolutionary discourse that mingled together custom and reason, written and unwritten law, as sources of fundamental law.

169. CURRIE, *supra* note 161, at 130.

170. 10 U.S. (6 Cranch) at 139. Marshall's invocation of natural law was not unique to *Fletcher v. Peck*. In *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827), Marshall unequivocally asserted that contractual rights were pre-political natural rights: "[I]ndividuals do not derive from government their right to contract, but bring that right with them into society." *Id.* at 346.

171. 10 U.S. (6 Cranch) at 143.

172. 3 U.S. (3 Dall.) 386 (1798).

173. *Id.* at 388. Some devout positivists, like John Ely, have contended that Chase did not mean by this passage to embrace unwritten fundamental law as a judicially enforceable limit on legislation. See ELY, *supra* note 1, at 210-11. Other skeptics of natural law, such as David Currie, are convinced that Chase did, indeed, endorse natural law as a limiting principle. See CURRIE, *supra* note 161, at 46.

174. Charles Haines, for example, described Marshall's opinion in *Marbury v. Madison* as having "asserted Coke's theory of judicial supremacy." HAINES, *supra* note 86, at 202.

To be sure, reliance upon unwritten law was a source of some controversy, symbolized by the famous debate between Samuel Chase and William Iredell over the proper role of natural law in constitutional adjudication. Justice Iredell contended that judges could not void legislation "merely because it is, in their judgment, contrary to the principles of natural justice."¹⁷⁵ Iredell objected to natural law because "ideas of natural justice are regulated by no fixed standard."¹⁷⁶ While that objection might also be levelled against the written Constitution as well, Iredell also thought that the very idea of judicially enforceable unwritten limits on legislation was fundamentally incompatible with the concept of a written constitution.

The 1787 Convention did not draft a written constitution which simply restated the existing understanding of fundamental law. Rather, they deliberately set out to create a new statement of fundamental legal principles, with no pedigree in history or experience, the validity of which was entirely grounded in the fact that it was a charter adopted by the people through their representatives in the ratification conventions. Though Iredell did not explicitly say so, his view that a written constitution wholly displaces unwritten sources of fundamental law must have stemmed from a belief that the *only* form of fundamental law was that which was adopted by the people. If Iredell did entertain such a view of popular sovereignty, it was one which comported uneasily with the Lockean political theory that actuated much of revolutionary political thought.

Locke and Iredell would no doubt agree that "law becomes binding solely because of the people's consent."¹⁷⁷ A central aspect of Locke's vision was "that the sovereign merely succeeded to the private rights given up to it by the contracting individual members of society."¹⁷⁸ By assuming, as Iredell did, that the written Constitution delivered to the sovereign power to invade every aspect of human behavior except where written limits were specified, Iredell stood Lockean theory on its head. Lockean thought that "the state itself had no claim to new and independent rights as against the person under its control,"¹⁷⁹ but derived its powers from explicit cessions from the people. While a written constitution might be the definitive instrument for determining the limits of that cession, it could not be the final authority regarding the limits of the people's

175. *Calder*, 3 U.S. (3 Dall.) at 399.

176. *Id.*

177. Michael, *supra* note 6, at 457.

178. Massey, *Fundamental Rights*, *supra* note 8, at 315.

179. *Id.*

rights, for Lockean thought posited that "government powers are islands in a sea of individual rights, not the sea encompassing islands of enumerated liberties."¹⁸⁰ Iredell and modern commentators who deny utterly the existence of unenumerated rights fall into the error of supposing that, since the Constitution defines the extent of governmental power, it must also define the limits of retained individual liberties immune from the exercise of governmental power. The one does not follow from the other. The lively presence of natural law thought in constitutional adjudication during the post-revolutionary period is proof that Iredell's error was not uniformly shared. Of course, over time the blandishments of positivism have captured the legal imagination and natural law has had to live a fugitive existence. Nevertheless, the continued persistence of natural law thought in constitutional adjudication, under whatever guise, suggests that we implicitly realize the error of the Iredell position.

The Ninth Amendment is a logical textual home for the natural law element of constitutional adjudication. Some originalists contend that such a function is improper because it was never intended to perform that role. Without conceding that the original intentions of the framers must necessarily control today, I contend that the Ninth Amendment was designed to perform multiple functions, including the preservation of unwritten fundamental rights of the people from governmental invasion.

THE INTENDED PURPOSES OF THE NINTH AMENDMENT

In debating the intentions of the framers and ratifiers of the Ninth Amendment, most commentators assume that there was only one intended purpose for the amendment. The nature of the debate then becomes an exercise in invoking historical sources in an attempt to demonstrate that any given view of the Ninth Amendment is the most plausible one to attribute to the framers. There are at least two fundamental errors in any "single-purpose" approach: it ignores the multi-faceted and contradictory political theory which influenced the framers' efforts, and it provides a poorer account for the entire historical record than does the approach that assigns multiple objectives to the Ninth Amendment.

The 1787 Constitutional Convention occurred because the immediate post-revolutionary embrace of radical democratic egalitarian-

180. Massey, *supra* note 13, at 1265. The metaphor is Stephen Macedo's. See STEPHEN MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* 27 (1986).

ism centered in the state governments was not working.¹⁸¹ Virtually all the national leaders, including many men who would become Anti-Federalists, agreed that the need for free trade, servicing the public debt, and providing for such common needs as defense, demanded a significantly stronger central government.¹⁸² As a result, the Convention delegates were more commonly beset by fears of state encroachment upon national power than fears of federal displacement of state power. Despite this attitude, the Framers were not indifferent to the possibility that the new central government would abuse its powers. Accordingly, they employed a number of familiar structural devices both to disperse power among the branches of government and to check its exercise in order to prevent the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . [for this] may justly be pronounced the very definition of tyranny."¹⁸³

An equally indispensable device for the preservation of liberty was the preservation of the independent status of the states. Madison argued that one advantage of the new Constitution was that "the federal and state governments . . . [would possess] the disposition and the faculty . . . to resist and frustrate the measures or each other."¹⁸⁴ To curb "ambitious encroachments of the federal government[] on the authority of the State governments"¹⁸⁵ the Framers created structures by which the central government was forced to depend upon the states for its very existence.¹⁸⁶ To facilitate further the independence of the states, the central government was granted a "few and defined" number of powers, while the states retained power over "all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people."¹⁸⁷

181. See generally McDONALD, *supra* note 14, at 143-83 (describing period of 1776-87); WOOD, *supra* note 14, at 393-429 (describing political climate leading to Constitutional Convention).

182. See HERBERT A. STORING, *WHAT THE ANTI-FEDERALISTS WERE* For 24-32 (1981), for a most thoughtful survey of the Anti-Federalists' view of the need for a stronger central government. Storing argued that the Anti-Federalists were divided on this point, but even those who accepted the need for a stronger central government did so only with respect to limited purposes, such as national defense.

183. THE FEDERALIST No. 47, at 245-46 (James Madison) (Max Beloff ed., 1987).

184. THE FEDERALIST No. 46, at 240 (James Madison) (Max Beloff ed., 1987).

185. *Id.* at 242.

186. See, e.g., THE FEDERALIST No. 45, at 236 (James Madison) (Max Beloff ed., 1987). These devices included state control over the qualifications of voters, the election of senators by state legislatures, and the use of the electoral college or voting by state within the House of Representatives to elect the president.

187. *Id.* at 237-38.

Thus, the framers expected "that the protection of citizen rights . . . [would] be governed by state constitutional law."¹⁸⁸ This is not surprising, for the framers regarded sovereignty as resting ultimately with the people, and recognized that the people of each state had been careful to create structures by which written and unwritten fundamental law would be enforced to limit the illegitimate pretenses of the people's legislative agents. Because of the existence of this principle, a "federal republic . . . of both national and state governments was possible because the people, as the sovereign body, were superior to each government and could determine the precise amount of power allocated to each."¹⁸⁹ Accordingly, because the federal and state governments were "different agents and trustees of the people, instituted with different powers, and designated for different purposes,"¹⁹⁰ Madison and the Federalists saw no need for an enumerated bill of rights, because the sovereign people had made an explicit, and quite narrow, delegation of power to the central government in the new Constitution.

The Anti-Federalists, however, did not see matters the same way. George Mason unsuccessfully urged the Constitutional Convention to adopt a Bill of Rights since, by virtue of the Supremacy Clause, all federal laws would be "paramount to State Bills of Rights."¹⁹¹ Ultimately, of course, the lack of a bill of rights became "the chief rallying point for the opponents to the Constitution during the ratification debates."¹⁹²

The principal objection to the proposed Constitution was that it "would create an oppressive national government and destroy the political authority of the states."¹⁹³ To back up their charge, the Anti-Federalists pointed to the "consolidated" nature of the pro-

188. Arthur E. Wilmarth, Jr., *The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 AM. CRIM. L. REV. 1261, 1272 (1989). Several delegates expressed this sentiment explicitly during the 1787 Convention. It is recorded of Oliver Ellsworth that he trusted "for the preservation of his rights to the State Govt. From these alone he could derive the greatest happiness he expects in this life." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 492 (Max Ferrand ed., 1937) [hereinafter *Convention Records*]. Similarly, Roger Sherman declared that a Bill of Rights was not necessary, because "[t]he State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient." 2 *id.* at 588.

189. Wilmarth, *supra* note 188, at 1273.

190. THE FEDERALIST NO. 46, at 239 (James Madison) (Max Beloff ed., 1987).

191. 2 *Convention Records*, *supra* note 188, at 588 (George Mason speech of Sept. 12, 1787).

192. Wilmarth, *supra* note 188, at 1276; *see also* STORING, *supra* note 182, at 64-70. "[T]he legacy of the Anti-Federalists was the Bill of Rights." *Id.* at 65.

193. Wilmarth, *supra* note 188, at 1276; STORING, *supra* note 182, at 15-23 (discussing Anti-Federalist "belief that there was an inherent connection between the states and the

posed central government, a government with sweeping legislative and judicial powers and the authority to make its legislation supreme—displacing in the process any contrary state statutory or constitutional law. But because there were powerful practical reasons to create a stronger central government than under the Articles of Confederation, the Anti-Federalists “reluctant[ly] accept[ed] . . . the instrument provided that appropriate constitutional restraints were placed upon the powers of the federal government.”¹⁹⁴

The restraints deemed necessary were not only an enumeration of individual liberties in the form of a bill of rights, but also a clear statement “point[ing] out what powers were reserved to the state governments, and clearly discriminat[ing] between [such powers] and those which are given to the general government.”¹⁹⁵ Accordingly, every one of the eight states whose ratification conventions proposed amendments to the Constitution included an amendment reserving to the states all unenumerated rights and powers.¹⁹⁶

Federalists asserted reasonably enough that “any enumeration of rights would necessarily be imperfect and would create the inference that no rights existed except those itemized.”¹⁹⁷ Indeed, during the House of Representatives’ debate of the Bill of Rights it was asserted that the drafting “committee . . . proceeded on the principle that these [enumerated] rights belonged to the people; they conceived them to be inherent.”¹⁹⁸ Representative Theodore Sedgwick retorted that “if the committee were governed by that general principle, they might have gone into a very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat if he please; that he might get up when he pleased, and to go to bed when he thought proper.”¹⁹⁹ Sedgwick thought that it was pointless to attempt to itemize every “self-evident, unalienable right which the people possess”²⁰⁰ since most such rights “never

preservation of human liberty. . . . [since] states . . . are the natural homes of individual liberty.”).

194. Wilmarth, *supra* note 188, at 1281; STORING, *supra* note 182, at 24-37 (discussing qualified acceptance by Anti-Federalists of stronger central government).

195. 3 ELLIOT’S DEBATES, *supra* note 97, at 271 (George Mason speech of June 11, 1788 in Virginia convention); *see also* 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 793 (Bernard Schwartz ed., 1971) [hereinafter “BILL OF RIGHTS HISTORY”].

196. *See* 2 BILL OF RIGHTS HISTORY, *supra* note 195, at 665-66 (Pennsylvania); *id.* at 712 (Massachusetts); *id.* at 732 (Maryland); *id.* at 757 (South Carolina); *id.* at 760 (New Hampshire); *id.* at 842 (Virginia); *id.* at 911-12 (New York); *id.* at 968 (North Carolina).

197. Massey, *Fundamental Rights*, *supra* note 8, at 309.

198. 1 ANNALS OF CONG. 731-32 (Joseph Gales & W. Seaton eds., 1789) (remarks of Rep. Benson) [hereinafter ANNALS OF CONG.].

199. *Id.* at 732.

200. *Id.* at 731.

would be called into question,"²⁰¹ nor were such rights "intended to be infringed" by the new Constitution.²⁰² Implicit in this argument was the view that "inherent liberty rights retained by the people are unenumerable because the human imagination is limitless."²⁰³

Moreover, the enumeration of certain rights carried with it the danger that "by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure."²⁰⁴ Thus, it was preferable to enumerate imperfectly "the powers of the federal government with the implication that powers not enumerated were reserved to the people, than to attempt an imperfect enumeration of rights reserved to the people, with the implication that rights not so reserved were impliedly delegated to the federal government."²⁰⁵

Even though Anti-Federalists responded to the Federalist argument by contending that the enumeration of federal government powers was already unbounded,²⁰⁶ arguing that the unamended Constitution itself had committed the evil of a partial enumeration of rights,²⁰⁷ and expressing reservations over whether an incomplete enumeration of rights could be overcome by a declaration that

201. *Id.*

202. *Id.* at 732.

203. Randy E. Barnett, *Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 615, 628 (1991).

204. 1 ANNALS OF CONG., *supra* note 198, at 439 (Rep. Madison).

205. Massey, *Fundamental Rights*, *supra* note 8, at 309; *see also* Wilmarth, *supra* note 188, at 1285. To similar effect were James Wilson's remarks during the Pennsylvania ratification convention:

[A]n imperfect enumeration [of rights] would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete. On the other hand, an imperfect enumeration of the powers of government reserves all implied power to the people But of the two, . . . an omission in the enumeration of the powers of government is neither so dangerous nor important as an omission in the enumeration of the rights of the people.

2 ELLIOT'S DEBATES, *supra* note 97, at 436-37.

206. Anti-Federalists were quick to refer to the General Welfare and Necessary and Proper Clauses in the Constitution as heads of unbounded power. Anti-Federalists would be dismayed, but not surprised, at the present extent of such other heads of federal legislative authority as the commerce clause. *Cf.* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987) (criticizing twentieth century expansion of commerce clause).

207. Indeed, the Constitution had enumerated such rights as the right to jury trial in criminal cases, U.S. CONST. art. III, § 2, the right to habeas corpus, U.S. CONST. art. I, § 9, and the prohibition of bills of attainder and ex post facto laws. *Id.*

"all rights are reserved . . . which are not expressly surrendered,"²⁰⁸ the effort to enumerate rights proceeded to fruition. One key to the success of the effort, however, was the inclusion of what ultimately became the Ninth Amendment.

In the course of his effort to guide the Bill of Rights through the First Congress, James Madison proposed that the enumeration of specific rights in the Constitution "shall not be construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution."²⁰⁹ Madison explained that the proposal was designed to "guard[] against . . . [the] implication that those rights which were not [enumerated] were intended to be assigned into the hands of the General Government."²¹⁰ In making this argument, Madison echoed James Wilson's earlier contention to the Pennsylvania ratification convention that, by enumerating rights, "everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of government; and the rights of the people would be rendered incomplete."²¹¹

There are two aspects to the argument. One is the view that, since the new central government was a government of limited and enumerated powers, any attempt to enumerate rights which were immune from the exercise of those powers carried with it an unwanted implication that the central government possessed implied authority to invade these rights, else the enumeration would not have been necessary. On this view, the function of the Ninth Amendment was to rebut that inference and negate any attempt to enlarge the enumerated and delegated powers of the central government.²¹² A different aspect of the Madison-Wilson argument is

208. Letter XVI from THE FEDERAL FARMER (Jan. 20, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 324 (Herbert J. Storing ed., 1981).

209. 1 ANNALS OF CONG., *supra* note 198, at 435 (remarks of James Madison on June 8, 1789); 2 BILL OF RIGHTS HISTORY, *supra* note 195, at 1027.

210. 1 ANNALS OF CONG., *supra* note 198, at 439 (remarks of Rep. Madison).

211. 2 ELLIOT'S DEBATES, *supra* note 97, at 436 (Oct. 28, 1787).

212. This is the straightforward reading of McAfee's argument. See *supra* note 11. Although the thrust of McAfee's argument is as stated, at several points he attributed to the Ninth Amendment a crabbed application that his materials do not support. McAfee made the claim that the Ninth Amendment "says nothing about how to construe the powers of Congress or how broadly to read the doctrine of implied powers; it indicates only that no inference about those powers should be drawn from the mere fact that rights are enumerated in the Bill of Rights." McAfee, *supra* note 11, at 1300 n.325. Similarly, he argued that "the ninth amendment serves the unique function of safeguarding the system of enumerated powers against a particular threat arguably presented by the enumeration of limitations on national power. . . . If the government

the view that any enumeration of rights, necessarily being imperfect, would carry with it the implication that rights not enumerated are fair game for elimination by the new government. Speaking at the North Carolina ratification convention, James Iredell declared that,

it would not only be useless, but dangerous, to enumerate a number of rights which were not intended to be given up; because *it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation*; and it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.²¹³

contended in a particular case that it held a general power to regulate the press as an appropriate inference from the first amendment restriction on that power . . . the ninth amendment would provide a direct refutation." *Id.* at 1306-07 (emphasis added). McAfee added that the fact "[t]hat such arguments have never been made is a testimony perhaps to the efficacy of the ninth amendment, or perhaps to the speciousness of the original concern." *Id.* at 1307.

But such arguments *have* been made, and McAfee overlooked them. In the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870), Justice Strong, writing for the Court, argued that adoption of the Bill of Rights "tend[s] plainly to show that, in the judgment of those who adopted the Constitution, there were powers created by it, neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted." *Id.* at 535. Justice Strong illustrated this general principle by noting that,

[t]he power to suspend . . . [habeas corpus] is not expressly given, nor can it be deduced from any of the particularized grants of power. Yet it is provided that . . . [habeas corpus] shall not be suspended except in certain defined contingencies. This is no express grant of power. It is a restriction. But it shows irresistibly that somewhere in the Constitution power to suspend . . . [habeas corpus] was granted

Id. at 534. If McAfee is correct that the Ninth Amendment has only the narrow application he attributed to it, this is the very instance in which it applies, yet neither Justice Strong nor any of his cohorts even alluded to the Ninth Amendment.

Moreover, McAfee overlooked completely Madison's argument in the House of Representatives that Congress lacked any power, implied from its enumerated powers, to charter a national bank. Madison contended that "[t]he latitude of interpretation required by the [bank] bill is condemned by the rule furnished by the Constitution itself, instantiated [in the Ninth Amendment] . . . as guarding against a latitude of interpretation [of the enumerated powers of Congress]." 2 ANNALS OF CONG., *supra* note 198, at 1899, 1901 (statement of Rep. Madison); *see also* Barnett, *supra* note 203, at 635-39. Since McAfee relied so heavily upon Madison in other respects it is curious indeed why this direct refutation by Madison of McAfee's crabbed reading of the Ninth Amendment should go wholly unmentioned.

213. 4 ELLIOT'S DEBATES, *supra* note 97, at 167 (July 29, 1788) (emphasis added). Some might contend that using Iredell as authority for the proposition that the Ninth Amendment secures unenumerated rights from governmental encroachment is curious, given Iredell's noted positivism. There are two answers to the charge. First, Iredell was never called upon to consider a claim that Ninth Amendment rights are as much a part of the written Constitution as any enumerated right. Enforcement of such rights is consistent with Iredell's view, expressed in *Calder v. Bull*, that judges were entitled to

On this view, unenumerated rights would be endangered, not from some enhanced implied power of government, but simply because the new government, using its conceded powers, could argue that the right in question, not being enumerated, is no right at all.²¹⁴ The surprise is that these two views should seemingly be regarded as mutually exclusive.²¹⁵ Both views are directed toward a common end—the more effectual securing of human liberty from governmental encroachment. Because governments can invade liberty both by illegitimately claiming enlarged powers and by using admitted powers to invade long-recognized and well-understood rights that seemed so obvious as not to require a statement of their existence, the more logical explanation is that the framers realized this duality and thought the Ninth Amendment would deal with both problems. Moreover, by starting from the proposition that the Ninth Amendment was designed to serve both of these objectives, better sense can be made of the historical evidence.

During the Virginia debate on ratification of the Bill of Rights, Hardin Burnley informed James Madison by letter that Edmund Randolph had professed displeasure with the Ninth Amendment because “there was no criterion by which it could be determined whether any particular [unenumerated] right was retained or not. . . . [Randolph preferred] that this reservation against constructive power, should operate rather as a provision against extending the powers of Congress by their own authority, than as a reservation of rights reducible to no definitive certainty.”²¹⁶ Burnley added that he did not see “the force of the distinction, for by preventing an

enforce only the written Constitution. Alternatively, it is possible (though implausible) that Iredell simply changed his mind between the 1788 North Carolina ratification convention and his later opinion in *Calder v. Bull*.

214. Perhaps the most eloquent spokesman for this view is Randy Barnett. See Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988) [hereinafter Barnett, *Reconceiving*]; Barnett, *supra* note 203.

215. McAfee, for example, was bold enough to assert that “[t]he combination of text, context, and historical consensus . . . establishes [his residual rights view of] the meaning of the ninth amendment as conclusively as it can for any constitutional provision whose meaning is not self-evident on its face.” McAfee, *supra* note 11, at 1318. John Hart Ely, on the other hand, contended that, by the Ninth Amendment, Madison “wished to forestall both the implication of unexpressed powers and the disparagement of unenumerated rights.” ELY, *supra* note 1, at 36. Randy Barnett recognized that while James Madison might have recognized “two conceptual strategies for accomplishing a single objective” of preserving retained rights—preventing the accretion of congressional power by implication and providing a source of judicially enforceable unenumerated individual rights—he was committed to the latter strategy. Barnett, *Reconceiving*, *supra* note 214, at 16.

216. 2 BILL OF RIGHTS HISTORY, *supra* note 195, at 1188 (letter from Hardin Burnley to James Madison, dated Nov. 28, 1789, in which Burnley attributed these sentiments to Randolph).

extension of power in [Congress] safety will be insured . . . [and also] by protecting the rights of the people . . . an improper extension of power will be prevented & safety made equally certain."²¹⁷

Madison repeated the gist of Burnley's summary of Randolph's objections in a letter to George Washington. Madison declared that Randolph's distinction between a "reservation against constructive power," on the one hand, and a "reservation of rights reducible to no definitive certainty,"²¹⁸ on the other hand, was "altogether fanciful. If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended. If no such line can be drawn, a declaration in either form would amount to nothing."²¹⁹ It seems quite obvious that Madison thought that cabining powers and reserving rights were simply two avenues to the same destination. Moreover, it appears reasonably clear that Madison thought the two approaches were equally efficacious.²²⁰ As John Ely has observed,

217. *Id.*

218. *Id.* (letter from Hardin Burnley to James Madison, dated Nov. 28, 1789). McAfee argued that the distinction drawn by Randolph was between the Ninth Amendment and its Virginia predecessors, the first and seventeenth amendments proposed by the Virginia ratification convention. McAfee, *supra* note 11, at 1292. Yet, the context in which the distinction was drawn—in both Burnley's and Madison's letters—was always one in which the amendment's function as a means to limit extensions of congressional power was contrasted with its function as a reservation of individual rights. McAfee's purported distinction is helpful to bolster his argument that everyone involved thought the Ninth Amendment's sole function was to cabin powers, but, in the context of the actual correspondence in which the term is used, McAfee's construction appears to be based on shadows in the gloaming.

219. *Id.* at 1189, 1190 (Letter from Madison to George Washington, Dec. 5, 1789); *see also* 5 THE WRITINGS OF JAMES MADISON 431-32 (Gaillard Hunt ed., 1904).

220. A slightly different construction of Madison's argument is that he meant that, for individual rights to be secure from governmental invasion, it would be necessary for both the Ninth and Tenth Amendments to constrain the powers of the newly established central government. *See* Barnett, *Reconceiving*, *supra* note 214, at 15-16; Massey, *supra* note 13, at 1239. The failure of either to do so would be inimical to the preservation of a zone of individual autonomy where governments could not intrude. Given that Madison conceived of the Ninth Amendment as performing both a power limiting and rights enhancing role there is no dissonance in supposing that the Tenth Amendment was designed to augment the Ninth Amendment's power limiting role.

This view is supported by Madison's correspondent, Hardin Burnley. Burnley believed that "the supporters of the Bill of Rights in the Virginia legislature deemed *both* the ninth *and* tenth amendments to be essential in order to assure the efficacy of the previous amendments." Wilmarth, *supra* note 188, at 1302. Thus, "[t]he Burnley-Madison letters confirm that the ninth and tenth amendments were intended to operate in tandem to protect the unenumerated rights of the people and the unenumerated powers of the states against federal encroachment." *Id.*; *see also* Barnett, *Reconceiving*, *supra* note 214, at 4-16 (arguing Ninth Amendment, as well as Tenth Amendment, bars extension of federal powers through unwarranted implication and limits the means of exercising such powers); *Hearings Before the Committee on the Judiciary, United States Senate, on*

in this latter aspect of his argument, Madison made "what we would today regard as a category mistake, a failure to recognize that rights and powers are not simply the absence of one another but that rights can cut across or 'trump' powers."²²¹

Moreover, when in the nineteenth century newly admitted American states crafted their own constitutions, they typically added a Ninth Amendment of their own to their constitutions.²²² It is hard to understand why any group of state constitution makers would have done so if they had thought the Ninth Amendment was simply a device to cabin federal legislative power. The clear inference is that the understanding of the Ninth Amendment in 1819, for example, when Maine and Alabama adopted constitutions, was that it preserved individual rights as well as preventing unwarranted accretion to federal legislative power.²²³

If the Ninth Amendment was designed, in part, to preserve unenumerated individual rights from federal invasion, it is necessary to specify how those rights are to be located. There are two principal sources: natural law and state constitutions. I will not belabor the contention that state constitutions may serve as a source of independently enforceable federal constitutional rights;²²⁴ rather my

the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, 100th Cong., 1st Sess. 249 (1987) [hereinafter *Bork Hearings*] (stating that "ninth amendment may be a direct counterpart to the 10th amendment").

221. ELY, *supra* note 1, at 36 (footnote omitted).

222. See the constitutions of Alabama (1819), 1 Thorpe, *supra* note 76, at 98; Arkansas (1836), *id.* at 270-71; California (1849), *id.* at 392; Colorado (1876), *id.* at 478; Florida (1885), 2 *id.* at 734; Georgia (1865), *id.* at 811; Iowa (1846), *id.* at 1125; Kansas (1855), *id.* at 1181; Louisiana (1868), 3 *id.* at 1450; Maine (1819), *id.* at 1649; Maryland (1851), *id.* at 1716; Minnesota (1857), 4 *id.* at 1993; Mississippi (1868), *id.* at 2071; Missouri (1875), *id.* at 2232; Montana (1889), *id.* at 2304; Nebraska (1866-67), *id.* at 2351; Nevada (1864), *id.* at 2404; New Jersey (1844), 5 *id.* at 2600; North Carolina (1868), *id.* at 2803; Ohio (1851), *id.* at 2915; Oregon (1857), *id.* at 3000; Rhode Island (1842), 6 *id.* at 3224; South Carolina (1868), *id.* at 3285; Virginia (1870), 7 *id.* at 3875; Washington (1889), *id.* at 3975; Wyoming (1889), *id.* at 4120.

223. Five states recognized that the Ninth Amendment preserved the dual role of cabining powers and preserving individual rights, for they expressly separated the two principles in their constitutions. See the constitutions of Kansas (1855), 2 *id.* at 1181; Nebraska (1866-67), 4 *id.* at 2351; North Carolina (1868), 5 *id.* at 2803; Ohio (1851), *id.* at 2915; and South Carolina (1868), 6 *id.* at 3285.

224. See Massey, *supra* note 13, for a fuller exploration of state constitutions as sources of Ninth Amendment rights. Other commentators agree as to the legitimacy of the source if not the implications I have drawn. See Raoul Berger, *The Ninth Amendment: The Beckoning Mirage*, 42 RUTGERS L. REV. 951, 956 (1990) (arguing Ninth Amendment "was designed to limit federal powers . . . [by preventing] any exercise of power which may endanger the states . . ."); Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 73 VA. L. REV. 223, 265 (1983) ("the ninth amendment embraces those individual liberties protected by state laws"); Wilmarth, *supra* note 188, at 1297-98 ("the ninth amendment was originally intended to allow the people of each state to define unenumerated rights under their own constitution and laws, free from federal

focus here is upon the natural law component of Ninth Amendment rights. But before turning to the difficult problem of constructing a method by which judges can locate such rights without resort to sheer personal preference, it is necessary to dispose of the contemporary significance of the argument that the *sole* intended function of the Ninth Amendment was to eliminate the possibility that an enumeration of rights would furnish justification for Congress to seize additional, and implied, powers.

THE CONTEMPORARY SIGNIFICANCE OF THE "POWER-LIMITING"
ROLE OF THE NINTH AMENDMENT

Even if one were to grant the validity of the argument that the Ninth Amendment was intended to perform only the role of preventing the extension of federal legislative power by implication, and even if we were to concede the even more debatable point that in the course of contemporary constitutional interpretation we are obligated to effectuate the framers' intent, it by no means follows that we are compelled to regard the Ninth Amendment as simply a judicially unenforceable structural limit upon congressional power. After two centuries of constitutional development, we no longer make any serious attempt to control the extent of the implied powers of Congress. If the Ninth Amendment's original intent was to provide a rule of construction by which claims of implied congressional power would be greeted skeptically, that function has been irretrievably eclipsed by the awesome breadth of contemporary federal power.

To preserve its original function, it is necessary to apply to the Ninth Amendment a sort of constitutional *cy pres* doctrine. When faced with the problem of an expressed testamentary intent that is impossible to achieve, courts seek to effectuate as nearly as possible the testator's intent. Similarly, if the Ninth Amendment's intended purpose was simply to confine the extent of congressional power by preventing a latitudinarian interpretation of the scope of that power, it is evident that, apart from a radical reconstruction of existing doctrine, that intent can no longer be accomplished. To effectuate the original intent as near as possible it is necessary to constrain governmental power by reading the Ninth Amendment as

interference"); *Bork Hearings*, *supra* note 220, at 249, 290 ("I think the ninth amendment says that, like powers, the enumeration of rights shall not be construed to deny or disparage rights retained by the people in their *State Constitutions*. That is the best I can do with it. . . . [I]t is a little hard to know what category of rights, if any, were supposed to be preserved by the ninth amendment unless it is the state constitutional rights.") (testimony of Judge Bork) (emphasis added).

a source of judicially enforceable individual rights which operate to limit the exercise of governmental power.

The notion of "constitutional *cy pres*" is not without precedent. By prohibiting states from making or enforcing "any law which shall abridge the privileges and immunities of citizens of the United States," the creators of the Fourteenth Amendment intended "to embrace [the rights] . . . guaranteed by the first eight amendments and other basic liberties" ²²⁵ Of course, those intentions were promptly throttled by the *Slaughter-House Cases*, ²²⁶ in which the Supreme Court assigned to the Privileges and Immunities Clause the role of protecting only the rights of national citizenship, and then proceeded to treat all the important and fundamental rights of citizenship as aspects of state citizenship, ultimately "left to the unfettered discretion of the local governments." ²²⁷ Given the lack of will to overturn directly the *Slaughter-House* decision, the intentions of the Privileges and Immunities Clause have proven impossible to implement. In a *de facto* application of constitutional *cy pres*, the Court has given an expansive reading to the Due Process and Equal Protection Clauses of the Fourteenth Amendment in order to accomplish the intended purposes of the privileges and immunities clause. The original desire to apply the Bill of Rights to the states has been largely accomplished by the selective incorporation of various guarantees of the Bill of Rights into the Due Process Clause. The Court's response to the desire to protect against state invasion "fundamental right[s] which belong, of right, to the citizens of all free governments" ²²⁸ has been to read into the Due Process Clause

225. JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 180 (1956). Representative Jonathan Bingham, the architect of the Privileges and Immunities Clause, expressly declared that "the privileges and immunities of citizens of the United States as contradistinguished from the citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States." CONG. GLOBE, 42d Cong., 1st Sess., App. 85 (1871). Bingham also pointed to the Privileges and Immunities Clause of article IV as his model. CONG. GLOBE, 39th Cong., 1st Sess. part 2, 1033-34 (1866). In *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825) (No. 3230), Justice Washington, on circuit duty, determined that the article IV clause protected privileges "which are, in their very nature fundamental; which belong, of right, to the citizens of all free governments." Senator Howard relied directly on *Corfield v. Coryell* to define the content of the Fourteenth Amendment's privileges and immunities and added that "[t]o these . . . should be added the personal rights guarantied and secured by the first eight amendments of the Constitution." CONG. GLOBE, 39th Cong., 1st Sess., 2765 (1866).

For contrary views of the Fourteenth Amendment's origins, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949).

226. 83 U.S. (16 Wall.) 36 (1873).

227. Lucile Lomen, *Privileges and Immunities Under the Fourteenth Amendment*, 18 WASH. L. REV. 120, 124 (1943).

228. *Corfield*, 6 F. Cas. at 551.

protection for certain implied fundamental rights, like privacy, and to subject state infringements of fundamental rights to the most stringent judicial scrutiny under the Equal Protection Clause.

There are three major ways in which constitutional *cy pres* can be applied to the Ninth Amendment. The amendment can be seen as securing against federal invasion individual rights having their origin in state constitutions.²²⁹ The amendment can be read as "a rule of interpretation . . . [that] acts as a presumption in favor of generalizing"²³⁰ about the scope of explicit constitutional terms in order to protect unenumerated "rights which are *consistent* with the enumerated rights."²³¹ Finally, the amendment can be treated as an admonition to locate and enforce rights having their origin in natural law.

The Anti-Federalist Function

To read plausibly the Ninth Amendment as protecting individual rights having their origin in state constitutions, it is necessary to consider the symbiotic relationship between the Ninth and Tenth Amendments. The Tenth Amendment, regarded today as a truism that the states retain those powers not delegated to the central government, was intended to complement the power limiting aspect of the Ninth Amendment. If the Ninth Amendment was intended in part to prevent the accretion of federal power by implication from the fact of enumerated rights exempt from that power, the Tenth Amendment was designed to prevent the accretion of federal power by implication from any other source in the Constitution.

Some evidence of this parallel intent may be found in the congressional modification of the Tenth Amendment by which the phrase "or to the people" was added.²³² This phrase provides a linguistic parallel to Ninth Amendment rights for Tenth Amendment powers. Without the change, the Ninth Amendment would have operated to secure the unenumerated rights "retained by the people," while the Tenth Amendment would have simply preserved the residual powers to the states alone. By adding the phrase "or to the people" the Tenth Amendment makes plain that the people, as ultimate sover-

229. This is the subject of Massey, *supra* note 13.

230. LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 54, 111 (1991).

231. *Id.* at 110.

232. See 1 ANNALS OF CONG., *supra* note 198, at 790; 2 BILL OF RIGHTS HISTORY, *supra* note 195, at 1118 (House of Representatives debates of Aug. 18, 1789). Though the debates provide no certain reason for the change, the phrase was probably added to underscore the theme that "ultimate authority . . . resides in the people alone . . ." and that "[t]he federal and state governments are in fact but different agents and trustees of the people." THE FEDERALIST No. 46, at 239 (James Madison) (Max Beloff ed., 1987).

eigns, retain both unenumerated individual rights and the residual powers of government, which may or may not be vested by them in their state governmental agents.²³³ The two amendments were conceived as a tandem device by which the sovereign people manifested their residual sovereignty. By the Ninth Amendment, the people retained their unenumerated rights; by the Tenth Amendment, they retained the non-delegated and unprohibited powers.

Both amendments were intended to preserve to the people of the states the sovereign's prerogative to confer powers upon their state governmental agents (recognized in the Tenth Amendment) and to create individual rights secure from governmental invasion (recognized in the Ninth Amendment). The intended medium for doing so, in both cases, was the state constitution. The Ninth Amendment recognizes that individual rights stemming from a source other than enumeration in the federal Constitution may, nevertheless, not be treated any differently from individual rights which are expressly enumerated in the federal Constitution. Both types of rights are entitled to parity of treatment under the federal Constitution; Congress is effectively disabled from infringing either type. The Tenth Amendment "simply recognizes that the people of the states and their state governmental agents retain residual authority to act in the shade of federal powers. Thus, the ninth amendment creates federal rights, independent barriers to federal action, while the tenth amendment recognizes the existence of concurrent state powers beyond the frontier of federal power."²³⁴ The implications of this view to state constitutional law and the powers of Congress are beyond the scope of this paper and have been treated elsewhere.²³⁵

The "Rule of Interpretation" Function

This view, suggested by Laurence Tribe, is based on the assumption that "[t]he Ninth Amendment tells interpreters of the Constitution how *not* to 'construe' that document."²³⁶ Like McAfee, Tribe took the position that the Ninth Amendment was designed to prevent "the argument that [claimed] rights are not there just because

233. Justice Joseph Story, the most influential early constitutional commentator, interpreted the phrase "or to the people" to mean that "what is not conferred [to the national government], is withheld, and belongs to the state authorities, *if invested by their constitutions of government respectively in them*; and if not so invested, it is retained by the people, as a part of their residuary sovereignty." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1970) (emphasis added).

234. Massey, *supra* note 13, at 1241.

235. *Id.*

236. TRIBE & DORF, *supra* note 230, at 110.

they are not enumerated in the bill of Rights.”²³⁷ Tribe then “argue[d] that to make sense of the Ninth Amendment’s *proscriptive* role requires readers of the Constitution to assume that it also plays a *prescriptive* role.”²³⁸ The prescriptive role urged by Tribe is to justify a generous reading of the scope of the enumerated rights in the Constitution. While this is a reasonable role for the Ninth Amendment to perform in its reincarnation through constitutional *cy pres*, it is one which need not be so limited. After all, the text of the Ninth Amendment demands that the enumerated and unenumerated rights be treated equally. If we reduce the Ninth Amendment to an aid to construing the enumerated rights we have poorly served the ideal of parity between the enumerated and unenumerated rights. Of course, by giving explicit rights a wide scope we would, in effect, be protecting implied or unenumerated rights. This is an approach which has much to be said for it, but it is by no means mutually exclusive from other remedial approaches and can be subsumed within the natural law function.

The Natural Law Function

When the intellectual background of the colonial, revolutionary, and post-revolutionary periods are recalled, it is difficult to dismiss the influence of natural law on the creation of the Ninth Amendment. Indeed, Roger Sherman’s draft of the Bill of Rights expressly declared that “[t]he people have certain natural rights which are retained by them when they enter into Society.”²³⁹ Randy Barnett has accurately described this as “reflect[ing] the sentiment that came to be expressed in the Ninth [Amendment].”²⁴⁰ Thus, even if we grant for the sake of argument that the sole function of the Ninth Amendment was to prevent bloat of the powers delegated to Congress, the framers’ reason for selecting that purpose was because they regarded it as the most effective way of preserving the natural rights which they had never ceded to the government they created. Since, on this view, the framers labored under the misconception that rights were simply the absence of powers it is crucial, now that we know both that rights can trump powers and that the Ninth Amendment has failed of its original purpose, to recreate the framers’ vision by preserving directly the natural rights the framers sought to preserve indirectly.

237. *Id.* at 54.

238. *Id.* at 111.

239. See THE RIGHTS RETAINED BY THE PEOPLE 351 (Randy E. Barnett ed., 1989).

240. *Id.* at 7 n.16.

It is not easy to do this in a world filled with skepticism about whether there is any such thing as natural law. The object of the balance of this article is to overcome that skepticism by describing briefly what natural law is and is not, and by providing an account of a principled method of locating natural rights judicially enforceable through the Ninth Amendment.

THE LOGIC AND LIMITS OF NATURAL LAW IN CONSTITUTIONAL ADJUDICATION

"Human beings are apart from nature and a part of it. As *human* beings, we are uniquely capable of reflecting on our experience and formulating laws of our own governance. . . . As human *beings*, we are subject to nature's laws."²⁴¹ Western conceptions of natural law originated as an attempt to mediate this duality of the human condition. The Greeks posited that there was "a unitary normative natural order immanent in the cosmos, to which human beings adhere in both their aspects."²⁴² Thus, events determined by the causal order of nature are normatively prescribed, and events created by the human agency of free will also fulfill the cosmic plan. In the thirteenth century Thomas Aquinas used the Greeks' structure of natural law but displaced nature with the Christian God. Natural law thus became a divine law of eternal duration, "immanent in the creation, accessible to and binding on human beings."²⁴³

But as natural law wandered ever further from its theological home it became a device "used to identify whatever was deemed fundamental—that is, certain and non-negotiable."²⁴⁴ As a consequence "natural law was converted into natural rights, which meant only that the rights in question were self-evident."²⁴⁵ As the self-evident nature of almost any proposition increasingly comes to be doubted there is a corresponding increase in the skepticism with which any claim of natural right is greeted.

Early theories of natural law were distinctly ontological; they sought to explain the nature of being and, in particular, explain how it is that human beings can be simultaneously part of the natural order and free moral actors. Most modern theories of natural law are distinctly deontological; they seek to explain the nature of obligation and, in particular, explain the reasons why we can be obligated to obey law. In so doing, modern natural law emphasizes the

241. LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 1 (1987).

242. *Id.*

243. *Id.* at 2.

244. *Id.*

245. *Id.*

moral component of law, insisting that for "law" to be law it must correspond to the prepolitical demands of morality. In contrast, the dominant mode of contemporary legal thought, legal positivism, holds that "it is no sense a necessary truth that laws reproduce or satisfy certain demands of morality."²⁴⁶ The problem with almost all modern deontological theories of natural law is that they are unable to convince us that there is an objectively valid moral order, or at least one which we can identify.²⁴⁷ Ontological theories of natural law are no more convincing, at least when they begin to describe the particular normative natural order they claim exists.

Western society is deeply divided between moral skeptics and moral realists. Whether that fact is deplorable or cause for rejoicing is a judgment that need not be made here, but it is a fact with considerable implications for any attempt to incorporate natural law into constitutional adjudication. The problem is not the moral skepticism of our times; that is more of a symptom than a cause. The problem is that we are no longer able to agree upon even the fundamental suppositions of our existence.

There was a time in our past when our principal mechanism for regulating and adjusting social relationships was not formal declarations of law, but widely shared cultural customs and traditions. In that now distant day, law and custom were roughly coterminous and law simply mimicked the real force for controlling social behavior—the cultural ethos.²⁴⁸ This was a time in which belief in natural law was easy because, if only as a matter of description, law appeared to be inextricably tied to seemingly self-evident propositions about social organization. But the political, scientific, technological, economic, theological, and social revolutions of the last two centuries have broken that linkage between law and cultural ethos. Without a shared core of cultural values we have attempted, instead, to govern our behavior with law, and ever more law. At the same time, our conception of law has become increasingly positivistic because its connection to self-evident cultural propositions has been severed.²⁴⁹

246. H.L.A. HART, *THE CONCEPT OF LAW* 181 (1961).

247. See WEINREB, *supra* note 241, at 97-126 (discussing natural law theories of Lon Fuller, John Finnis, David Richards, and Ronald Dworkin).

248. See, e.g., John Barton, *Behind the Legal Explosion*, 27 *STAN. L. REV.* 567, 572-78 (1975).

249. Moreover, the trend toward positivism itself works to further erode the connection between law and cultural ethos. The cultural binding force of law is sapped because, in an increasingly positivistic world, "law is . . . *expected* to be artificial." *Id.* at 574.

There are several implications in this for natural law. First, natural law has its most powerful claim to legitimacy in a society with a commonly shared set of values which are thought transcendent to temporal deviance. If our society is lacking that fundamental condition, the role of natural law is necessarily attenuated, but not totally extinguished. Even in a society lacking a common set of values there are likely to be some propositions that are overwhelmingly, if not universally, accepted. In the presumably rare instance when such norms are contravened by legislatures, it is appropriate for courts to enforce the culturally shared principle of natural law to curb the usurpation of the legislature.²⁵⁰

Second, the present time, characterized by deep divisions concerning the proper relationship between moral values and the polity, is one in which natural law is implicitly asked to hibernate. Since hibernation is not death, it is appropriate to preserve the mechanisms by which natural law can contribute to our fundamental law at some future time. It would be an arrogant act for our generation to expunge natural law from the Constitution. It would be equally arrogant to give to natural law a place in contemporary constitutional adjudication that is larger than will be supported by the cultural foundations of our time.

For the present, it is reasonably clear that natural rights inhere in our culturally shared understandings of those individual practices which are so basic and fundamental to human liberty that it is beyond cavil that governments lack the legitimate moral authority to prohibit them. The problem is to define a method by which these fundamental rights can be identified in a fashion that is tied to some principle other than the moral predilections of the deciding judge.

There are multiple indicators of the conventional cultural understanding that forms the basis for contemporary natural rights. In the following two sections, I will examine briefly the potential sources from which we might conclude that there exists a sufficiently widely shared cultural understanding to support recognition of unenumerated natural rights as aspects of the rights retained by the

250. An example of this phenomenon might be a law banning married couples from using contraceptives. It is likely that there is overwhelming, but not universal, agreement that such a law is repugnant to our current cultural ethos. If so, it seems illogical to expect such a law to exist. But, of course, such a law did exist (albeit without much enforcement) in Connecticut until it was invalidated in *Griswold v. Connecticut*, 381 U.S. 479, 481-86 (1965). The most likely explanation for the existence of laws contrary to the cultural ethos is that laws continue to exist long after the death of the cultural ethos that they manifested. A rule against perpetuities applicable to statutes might be a good idea. Cf. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

Ninth Amendment. I will then consider the risks of judicial enforcement of natural rights under the Ninth Amendment.

Inferences from the Constitution Itself

One can look to the Constitution itself and derive from the nature of the guarantees of that document principles which suggest that a given unenumerated right is within the ambit of those principles. This is essentially the approach taken by Justice Douglas in *Griswold v. Connecticut*,²⁵¹ in which the right of privacy was located in the penumbra of certain relevant enumerated rights, and by Professor Charles Black's emphasis on the importance of construing any portion of the Constitution by reference to the structural relationships created by the entire document.²⁵²

One can also consult the Constitution to determine whether any given claimed unenumerated right is consistent with the enumerated rights. Determination that any given claimed unenumerated right is consistent with the enumerated rights might result in a presumption of the validity of the putative unenumerated right. The burden would then rest with the government to overcome that presumption by demonstrating the existence of governmental interests that are sufficiently powerful to legitimate the exercise of governmental force upon presumptively reserved rights. The effect of this exercise would certainly be to treat unenumerated rights on a par with enumerated rights, but would not totally foreclose governments from legislative initiatives which can be justified.

Both Randy Barnett and Bernard Siegan have advanced some version of this argument. Barnett suggested that we "adopt a justificatory *presumption of liberty* that puts the burden on government to show that any interference with the exercise of the rights retained by the people is justified."²⁵³ Barnett added, of course, that "liberty does not mean license to do whatever one wishes" and contended that "[t]he common law . . . defines the boundaries within which one may do as one wishes. . . . Provided that one is acting rightfully [in terms of the common law] . . . government must justify any interference with such conduct."²⁵⁴ Barnett defended the common law as the instantiation of natural rights, "the means of giving these otherwise abstract [natural] rights a conventionally established, specific

251. 381 U.S. at 481-86.

252. See CHARLES BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

253. Barnett, *supra* note 203, at 630.

254. *Id.* at 630-31 (footnote omitted).

content.”²⁵⁵ The problem with reliance upon the common law is that it is a highly organic system that has been so radically altered by legislation that it is no longer, if it ever was, a reliable indicator of natural rights that would trigger the justificatory presumption urged by Barnett. Moreover, if I am correct that the nature of contemporary natural rights inheres in the *current* cultural ethos, Barnett’s justificatory presumption would never arise, for current positive law would act as the device to define the boundaries of liberty and it is, of course, the validity of precisely that law which is the question to be decided.

Bernard Siegan has proposed that governments be required to justify all legislation. According to Siegan, governments should “have the burden of persuading a court . . . that the legislation serves important governmental objectives; . . . that the restraint imposed by government is substantially related to achievement of those objectives, that is, . . . the fit between means and ends must be close; and . . . that a similar result cannot be achieved by a less drastic means.”²⁵⁶ Siegan’s position is one which derives considerable support from the original structure of the Constitution, a document which created a central government of carefully circumscribed powers. Given the limited grant of powers to the central government and the reservation of all rights (intended as a device to limit the growth by implication of the limited powers of government) it is entirely reasonable to place upon the government, rather than the citizen, the burden of justifying the validity of its conduct. If the modern meaning of the Ninth Amendment is to be found by bringing “constitutional *cy pres*” to bear upon it, Siegan’s test is well adapted to the furtherance of that goal.

Siegan’s test does not mean that courts will invalidate all legislative initiatives that impinge upon matters which have previously escaped regulation. In examining the justification offered by the government for any given legislation, courts ought to give considerable weight to the needs of the entire community, presumably expressed in the legislation under scrutiny. Mary Ann Glendon has properly excoriated our tendency to speak of rights with “exaggerated absoluteness, . . . hyperindividualism, and . . . silence with respect to personal, civic, and collective responsibilities.”²⁵⁷ Glendon contended that “[o]ur stark, simple rights dialect puts a damper on the processes of public justification, communication, and delibera-

255. *Id.* at 631 n.52.

256. BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 324 (1980).

257. MARY A. GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE*, at x (1991).

tion upon which the continuing vitality of a democratic regime depends . . . [and] contributes to the erosion of the habits, practices, and attitudes of respect for others that are the ultimate and surest guarantors of human rights."²⁵⁸ When confronted with challenges to legislation, and in the course of applying Siegan's test, it is entirely proper to uphold legislation which substantially serves some pressing public need, and does so in a fashion that impinges upon liberty in a fashion that is proportionate to the public benefits obtainable only through the legislation.²⁵⁹

History and Tradition

The history and traditions of our national experience ought also to be consulted, not to divine the "most specific tradition available,"²⁶⁰ but to determine "the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . [It] is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living

258. *Id.* at 171.

259. This is an approach that is similar to that taken by the Supreme Court of Canada in deciding when legislative infringements of rights guaranteed under the Charter of Rights and Freedoms are "demonstrably justified in a free and democratic society." CAN. CONST. (Constitutional Act, 1982) pt. I (Canadian Charter of Rights and Freedoms) § 1. In *Regina v. Oakes*, the Supreme Court of Canada established the following test for justification of legislative invasions of Charter rights:

First, the measures adopted must be carefully designed to achieve the objective in question. . . . [T]hey must be rationally connected to the objective. Second, the means, even if rationally connected to the objective. . . , should impair 'as little as possible' the right or freedom in question. . . . Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance.'

1 S.C.R. 103, 139 (Can. 1986).

The European Court of Human Rights employs a similar analysis. Article 8, § 1 of the European Convention on Human Rights guarantees "respect for . . . private life" but § 2 permits governments to interfere with that right when it is "necessary" to do so "in the interests of national security, public safety, . . . economic well-being of the country, . . . prevention of disorder or crime, . . . protection of health or morals, or for the protection of the rights and freedoms of others." Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, effective 1953, *reprinted in* COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 104-05 (1979). In *Dudgeon v. United Kingdom*, App. No. 45 Eur. H.R. Rep. 149, 164-65 (1981) (Commission), the Court interpreted "necessary" to mean (1) the existence of some pressing social need and (2) the presence of proportionality between the restriction imposed by the challenged legislation and the legitimate aims sought to be accomplished by the legislation.

260. *Michael H. v. Gerald D.*, 491 U.S. 110, 128 n.6 (1989).

thing.”²⁶¹ Our history and traditions are dynamic rather than static. They are not snapshots, frozen in time, in our family photo album; rather, they consist of a continuously running motion picture, to which new frames are added every moment of our existence.

It is mistaken to think, as do Justices Rehnquist and Scalia, that we can consult some static and specific referent to derive meaning from history and tradition. Indeed, modest reflection upon the possible referents that could be used illustrate the problem. Neither the absence nor presence of positive law bearing upon a particular claimed right can be dispositive. It is difficult to attribute meaning to the absence of law, and a long pattern of unconstitutional regulation only establishes a continuing legislative contempt for our fundamental law.²⁶² “Moreover, historical traditions, like rights themselves, exist at various levels of generality.”²⁶³ Nor is it easy to identify how we measure specificity when examining history and tradition. It is not clear whether this specificity refers to positive law or social attitudes and, if the latter, what device is appropriate to detect social attitudes. If there is no specific tradition available to tell us whether women desiring to abort are required to notify their husbands of their intent to do so, where do we turn for the most relevant specific tradition? Do we look to more general traditions concerning women’s reproductive freedom, or to traditions concerning fetuses, or to traditions concerning a husband’s control of his wife? Justice Scalia asserts that we must rely on the most specific tradition available, but he has no guidance for us here.

When consulting the garbled text of history and tradition, it is inevitable that choices must be made concerning the relevant evidence. Rather than pretending that there are, in fact, readily identifiable static and specific referents we ought, instead, look at the vectors of history—the rate, direction, and nature of change in our cultural ethos. A static perspective upon history and tradition would suggest that we have an entrenched practice of denying women the same measure of personal autonomy we have accorded men. Thus, for example, a statute that conditions availability of abortion upon the woman’s proof that she has notified her husband of her intent to abort might be considered consistent with history and tradition. But if the vector of our history and tradition is consulted, one would be forced to admit that it points to ever increasing

261. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

262. “[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national experience and indeed predates it.” *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970).

263. *TRIBE & DORF*, *supra* note 230, at 100.

recognition of the fundamental equality between the sexes as autonomous individuals. From this perspective, the same statute would seem to be at odds with a dynamic conception of our history and tradition. Because our contemporary conception of natural rights is one that relies on a shared cultural ethos, it is all the more important to choose the vectors of history rather than the tombstones of history to guide us in locating natural enumerated rights.

The Risks of Judicial Enforcement of Natural Rights

This process of divining natural rights is one that carries a great deal of risk, for the Court is not always certain to make the correct judgment that any given claimed natural right is sufficiently well-grounded in our cultural ethos to constitute such a right. Indeed, when the Court recognizes the existence of an unenumerated right, and that recognition itself becomes a bitter political issue, it is quite possible it has erred. Thus, the Court was correct to recognize the unenumerated natural right of married couples to use contraceptives,²⁶⁴ but possibly wrong to have recognized the right to terminate pregnancy as an unenumerated natural right.²⁶⁵

Moreover, there is no certainty that the Court is the correct institution to make this judgment. If natural rights in our time come down to a judgment about the current cultural understanding of the nature of such rights, why aren't democratically elected legislators more qualified than judges to make this determination?²⁶⁶ One answer may be that, given the evident constitutional bias toward making the government an island of powers in a sea of rights, it is appropriate not to vest too much trust in the organ that wields those powers—the legislature. But if doubt persists on this point, it might be appropriate to consider some judicially created version of the power given to Canadian legislatures, both national and provincial, to override certain constitutional guarantees.²⁶⁷ In fashioning natu-

264. *Griswold v. Connecticut*, 386 U.S. 479, 481-86 (1965).

265. *Roe v. Wade*, 410 U.S. 113, 152-54 (1973). This is not to suggest that *Roe v. Wade* was wrongly decided as a matter of constitutional law. It is to suggest that the Court was wrong to treat the right at issue as an unenumerated natural right. Of course, the Court said it was proceeding under the substantive aspect of the Due Process Clause, but the decision makes far more sense if it is reconstructed as an instance of recognizing and enforcing an unenumerated natural right. The Court would have done better to ground the right to terminate pregnancy in the Equal Protection Clause.

266. For some of the arguments germane to this point, see Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229, 1300-07.

267. See CAN. CONST. (Constitutional Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33. Either Parliament or a provincial legislature may declare that its legislation supersedes the fundamental rights guaranteed in the Charter. Such action is

ral rights under the Ninth Amendment, the Court might treat the rights thus established as only provisionally created, pending some definitive, explicit, and unequivocal repudiation by Congress. This is an iterative scheme that is much like the current relationship between Court and Congress with respect to the dormant, or negative, commerce clause.

Another mechanism by which to respond to the doubt that courts are the appropriate vehicle to enforce unenumerated rights might be a judicially created doctrine that such rights are subject to a much weaker version of *stare decisis* than is generally applicable to constitutional doctrine. This would, of course, make it easier for the Court to retreat from the recognition of new natural rights when it becomes obvious that there is no cultural ethos supporting the right.

In a sense, both the weak version of *stare decisis* and the judicially created version of Canada's override power seem to fly in the face of the Ninth Amendment's textual injunction not to *disparage* the unenumerated rights, for I do not make any suggestion that these doctrines would apply to enumerated rights. I have no powerful rebuttal to the objection. At bottom, my defense of these proposals rests primarily on the dubious ground of pragmatism. Given the skepticism, if not downright antagonism, with which discussion of the legitimacy of natural rights is greeted, I am casting about for methods which might make the medicine of natural law slide a bit easier down the throats of orthodox positivists. It is neither easy to reconstruct natural law in a positivistic world nor to sell the product to a skeptical audience. This is a tentative attempt in that direction.

CONCLUSION

Natural law has a long association with American ideas of fundamental law, both prior to, during, and after the Revolution. The tradition of judicial enforcement of natural rights as part of the fundamental law, thereby voiding contrary legislation, is equally long but considerably more controversial. The Ninth Amendment was intended, in part, to instantiate the natural law tradition. It was also designed to preserve, as against federal legislative invasion, rights secured under state constitutions and was thought to be a device by which the expansion of federal legislative powers by implication could be prevented. There is thus a reasonable warrant in the

limited in effectiveness for five years, but a legislature may renew the declaration for an unlimited number of successive five year terms. *Id.* Thus, if a national or provincial legislative majority feels strong enough about a matter, guaranteed human liberties may be eliminated in perpetuity.

"original intentions" of the founders to treat the Ninth Amendment as a source of judicially enforceable natural rights.

Even if one were to suppose that the only intended function of the Ninth Amendment was to guard against the extension of federal power by implication, there is good reason to treat the Ninth Amendment today as a source of individual rights which trump legislative powers. The battle against extending federal power by implication has been hopelessly lost. If the Ninth Amendment is to perform anything close to its originally intended function it is necessary to employ some form of constitutional *cy pres* to accomplish that object.

The problem of defining and locating natural rights in a principled fashion is not hopeless. Natural rights do exist in our positivistic world. In a sense, like Justice Stewart, we know them when we see them. Natural rights inhere in the cultural ethos that is widely shared. There may be relatively few instances of such rights that are also abrogated by legislative majorities, but they do occur. On those occasions, it is appropriate for courts to enforce the natural rights dimension of the Ninth Amendment. If there are doubts about the wisdom of courts acting in this manner, there are several devices available to us to temper this judicial action, by making judicial recognition of such rights subject to legislative revision or susceptible to review without the restraining effect of *stare decisis*.

We may live in a time of legal positivism and moral skepticism but it may not always be so. A small but increasing number of observers have begun to realize that "the Cartesian-Newtonian conception of the universe as a machine filled with separate objects"²⁶⁸ whose relationships are governed by principles of linear causality fails to describe observable phenomena.²⁶⁹ Instead, many westerners are discovering "that the Eastern conceptions of related duality—stressing dynamism, rhythm, balance, and harmony—describe an organic, holistic world that more closely approximates observable phenomena than the Cartesian-Newtonian view."²⁷⁰ In this emerging world-view opposites are no longer warring "thesis" and "antithesis" but paired complements. "Light does not struggle with dark for ultimate supremacy; rather, there would be no understanding of either concept without its complementary twin. The focus is

268. GEOFFREY WALKER, *THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY* 44 (1988).

269. See, e.g., *id.*; Calvin R. Massey, *Rule of Law and the Age of Aquarius*, 41 HASTINGS L. J. 757 (1990); Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989).

270. Massey, *supra* note 269, at 762.

no longer upon either aspect of a diad, but upon the *relationship* between them.”²⁷¹ The organizing principle of a world-view centered on relationships between connected phenomena is one of maintaining “dynamic balance.”²⁷² The implications of this world-view may not be fully appreciated as yet, but if it does begin to describe for us the meaning of our existence it may well lead to a state of affairs where we feel or sense a greater number of “certainties.” Should that come to pass, the ontological versions of natural law will walk the legal landscape again. We would be arrogant custodians of our fundamental law to expel natural law entirely from our discourse. Natural law deserves a role in our fundamental law. In our present world, its role is deservedly small, but it should not be shunned as a pariah.

271. *Id.*

272. WALKER, *supra* note 268, at 47.

